

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 871

>

MINORU YASUI

vs.

THE UNITED STATES OF AMERICA

**ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT**

FILED MARCH 29, 1942.

No. 10317

**United States
Circuit Court of Appeals
for the Ninth Circuit.**

MINORU YASUI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Upon Appeal from the District Court of the United States
for the District of Oregon**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For Appellee.

In the District Court of the United States for the
District of Oregon

March Term, 1942

Be It Remembered, That on the 22nd day of April, 1942, there was duly filed in the District Court of the United States for the District of Oregon, an Indictment, in words and figures as follows, to-wit: [1*]

In the District Court of the United States
for the District of Oregon

No. 16056

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MINORU YASUI,

Defendant.

INDICTMENT FOR VIOLATION OF PUBLIC
PROCLAMATION No. 3 OF THE WEST-
ERN DEFENSE COMMAND AND PUBLIC
LAW No. 503, 77th CONGRESS, AP-
PROVED MARCH 21, 1942.

United States of America,
District of Oregon—ss.

The Grand Jurors of the United States of America, for the District of Oregon, duly im-

* Page numbering appearing at foot of page of original certified Transcript of Record.

paneled, sworn and charged to inquire within and for said District, upon their oaths and affirmations, do find, charge, allege, and present:

That Minoru Yasui is a person of Japanese ancestry; that he was born at Hood River, Oregon, on the 19th day of October, 1916.

The Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present that the said Minoru Yasui, in the District of Oregon, and within the jurisdiction of this Court, on or about March 28, 1942, did commit an act in an area designated as a military area by a military commander, to-wit: Lieutenant General John L. DeWitt, the Commanding General of the Western Defense Command, the said Commanding General having been duly and properly appointed, designated, and authorized by the Secretary of War of the United States of America to designate and prescribe the said military area pursuant to and under the authority of the Executive Order of our President, commonly referred to as Executive Order 9066; and the said act committed by the said Minoru Yasui in the said military area was deliberately, wilfully and voluntarily contrary to and in violation of a restriction [2] and regulations known as Public Proclamation No. 3 applicable within the aforesaid military area, which said restriction and regulation was duly prescribed, promulgated, and announced by the said Commanding General of the Western Defense Command, the said Commanding General having been

duly appointed, designated, and authorized to prescribe the said restriction and regulation pursuant to and under the authority of the aforesaid Executive Order; and the act which the said Minoru Yasui did commit in violation of the aforesaid restriction and regulation being:

The said Minoru Yasui, on or about March 28, 1942, between the hours of 8 o'clock P.M. and 12 o'clock Midnight, and on March 29, 1942, between the hours of 12 o'clock A.M. and 6 o'clock A.M., that is to say, between the hours of 8 o'clock P.M. of March 28, 1942, and 6 o'clock A.M. of March 29, 1942, was not within his place of residence at Portland, Oregon; and the said act was contrary to the restriction and regulation set out in said Public Proclamation No. 3, which was duly prescribed, promulgated, and announced, as aforesaid, by said Commanding General of the Western Defense Command, as aforesaid, which said restriction and regulation provided that at all times from and after March 27, 1942, all alien Japanese and all persons of Japanese ancestry should and must, between the hours of 8 o'clock P.M. and 6 o'clock A.M., be within their respective places of residence;

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present to the Court that the said Minoru Yasui knew that he was a person of Japanese ancestry, and knew of or should have known of, and understood or should have understood, the restriction and regulation, which pro-

vided that all persons of Japanese ancestry should and must be within their respective places of residence between 8 o'clock P.M. and 6 o'clock A.M., knew of or should have known of the date the said restriction and regulation became effective, and knew or should have known the said restriction and regulation was applicable to him, and, further knew or should have known the said re- [3] striction and regulation was prescribed and promulgated by said military commander, to-wit: the Commanding General of the Western Defense Command; and, further, the said Minoru Yasui knew or should have known that his act, as aforesaid, was in violation of and contrary to the meaning and intent of the said restriction and regulation.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present that the said Minoru Yasui, in committing the above described act, did not act or purport to act pursuant to or within any exception authorized or made to the aforesaid restriction and regulation;

Wherefore, the Grand Jurors aforesaid, upon their oaths aforesaid, do present to the Court that the aforesaid Minoru Yasui, at the time and place, and in the manner and form aforesaid, committed an act contrary to the peace and dignity of the United States and contrary to the welfare, safety, and security of the United States, and contrary to the form of the statute of the United States in such case made and provided.

Dated at Portland, Oregon, this 22nd day of April, 1942.

A True Bill.

ARNOLD S. ROTHWELL,

Foreman, United States

Grand Jury

CARL C. DONAUGH

United States Attorney

[Endorsed]: A True Bill. Arnold S. Rothwell, Foreman. Filed in open Court April 22, 1942. G. H. Marsh, Clerk. [4]

And Afterwards, to wit, on the 4th day of May, 1942, there was duly Filed in said Court, a Stipulation to amend indictment, in words and figures as follows, to wit: [5]

[Title of District Court and Cause.]

STIPULATION

This Matter coming on to be heard on the demurrer of the defendant to the indictment herein, the defendant being present in person and represented by his counsel, Earl Bernard, the United States being represented by Carl C. Donaugh, United States Attorney for the District of Oregon, and Tom C. Clark, Special Assistant to the Attorney General, the Court of its own motion having

noted on Page 2 of the indictment, in Line 11, an apparent defect or imperfection in the matter of form only, in the use of the word "May" in designating the time of the offense and in the use of the word "or" in designating the time of the offense, which defects are plainly imperfections in matter of form only, for the reason that the charging portion of the indictment, on Page 1 thereof, Line 21, plainly and sufficiently designates the date of the alleged offense,

Now Therefore, the parties hereto, being desirous of having further proceedings based on the indictment herein, without more formal proceedings to clarify the apparent defect or imperfection in said indictment in the matter of form only, do hereby stipulate as follows:

The defendant, Minoru Yasui, stipulates and agrees that a reading of the indictment herein completely informs him of all the necessary elements of the charge against him, including the time and place of the alleged offense; that other averments of the indictment make plain to the defendant that the discrepancy hereinabove referred [6] to is a mere defect or imperfection in matter of form only and that he has in no way been prejudiced thereby;

It Is Further Stipulated and Agreed by the defendant and his counsel that in all future proceedings in this criminal action the indictment, by agreement, shall read, on Line 11, Page 2 thereof, as follows: "hours of 8 o'clock P.M. and 12 o'clock midnight, and on March 29, 1942."

Done in open court this 4th day of May, 1942.

MINORU YASUI

Defendant

E. F. BERNARD

Attorney for Defendant

CARL C. DONAUGH

United States Attorney for
the District of Oregon

Approved:

JAMES ALGER FEE

District Judge

[Endorsed]: Filed May 4, 1942. [7]

And afterwards, to wit, on Monday, the 4th day of May, 1942, the same being the 55th Judicial day of the Regular March, 1942, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [8]

[Title of Cause.]

May 4, 1942

ORDER TO AMEND INDICTMENT

Public Proclamation No. 3, Western Defense Command, Approved March 21, 1942.

Now at this day comes the plaintiff by Mr. Carl C. Donaugh, United States Attorney, Mr. Thomas C. Clark, Mr. Charles S. Burdell and Mr. Wallace

Howland, Special Assistants to the Attorney General of the United States; and the defendant in his own proper person and by Mr. Earl F. Bernard, of counsel. Whereupon the said defendant is duly arraigned upon the indictment herein, and waives reading of the same, and files herein a demurrer to the said indictment; and counsel for plaintiff and counsel for defendant in open court stipulate and agree that the indictment herein may be amended by substituting the word "and" for the word "or" and the word "March" for the word "May", at the end of line 11 on page 2 of the said indictment herein; and

It Is Ordered that the said indictment may be corrected in accordance with the said stipulation.

Whereupon the said defendant, in open court, withdraws his demurrer to the indictment herein and for plea to the said indictment now says that he is not guilty as charged therein. [9]

And Afterwards, to wit, on Friday, the 12th day of June, 1942, the same being the 88th Judicial day of the Regular March, 1942, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [10]

June 12, 1942

**WAIVER OF TRIAL BY JURY AND
TRIAL BY COURT****Indictment:****Public Proclamation Issued by Western Defense
Command**

Now at this day comes the plaintiff by Mr. Carl C. Donaugh, United States Attorney, Mr. J. Mason Dillard, Assistant United States Attorney, and Mr. Charles S. Burdell, Special Assistant to the Attorney General of the United States, and the defendant, above named, in his own proper person and by Mr. Earl F. Bernard, of counsel. Whereupon said defendant, in open court in person and by his counsel, waives a jury trial in this cause and consents that this cause may be tried by the Court without the intervention of a jury.

Thereupon appear: Gus J. Solomon, B. A. Green, Will Roberts, Randall B. Kester, Omar C. Spencer, Manley B. Strayer, R. R. Morris, Jack McLaughlin and Alfred A. Hampson, attorneys heretofore appointed by the Court as attorneys amicus curiae, and thereupon this cause comes on to be tried by the Court without the intervention of a jury. Thereafter, the Court having heard the evidence adduced, at the close of all of the testimony the said defendant moves the Court for a mandatory verdict of not guilty in this cause. Whereupon this cause is continued for argument until Thursday, June 18, 1942. [11]

And Afterwards, to wit, on Monday, the 16th day of November, 1942, the same being the 13th Judicial day of the Regular November, 1942, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [12]

[Title of District Court and Cause.]

ORDER OVERRULING MOTION FOR DIRECTED VERDICT AND VERDICT

This Cause having come on for hearing this 16th day of November, 1942, and the defendant, Minoru Yasui, being present in court in person with his attorney, John Collier, and the United States being represented by Carl C. Donaugh, United States Attorney for the District of Oregon, J. Mason Dillard, Assistant United States Attorney for the District of Oregon, and Charles S. Burdell, Special Assistant to the Attorney General, It Is Hereby Ordered, Adjudged, and Decreed: That the Motion for Directed Verdict heretofore made on behalf of the said defendant is overruled; It Is Further Ordered that the said defendant be remanded to the custody of the United States Marshal pending further proceedings.

Dated at Portland, Oregon, this 16th day of November, 1942.

JAMES ALGER FEE

Judge

[Endorsed]: Filed November 16, 1942. [13]

And Afterwards, to wit, on the 16th day of November, 1942, there was duly Filed in said Court, and entered upon the record, a Finding by the Court, in words and figures as follows, to wit: [14]

In the District Court of the United States
For the District of Oregon

No. C-16056

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MINORU YASUI,

Defendant.

FINDING

This cause by stipulation of the parties having come on for trial by the Court without the intervention of a jury and the Court having heard the evidence adduced, the arguments of counsel, and now being fully advised,

Finds the defendant, Minoru Yasui, guilty as charged in the indictment herein.

November 16, 1942.

JAMES ALGER FEE,
Judge

[Endorsed]: Filed November 16, 1942.

[15]

And Afterwards, to wit, on the 17th day of November, 1942, there was duly Filed in said Court, an Opinion, in words and figures as follows, to wit: [16]

[Title of District Court and Cause.]

OPINION

November 16, 1942

James Alger Fee, District Judge:

On December 7, 1941, the armed forces of the Emperor of Japan attacked the bases of the United States in the Islands of the Pacific Ocean without warning and without declaration of war. Congress, on December 8, 1941, by joint resolution, declared a state of war to be existing between the Imperial Government of Japan and the Government and people of the United States.¹

Thereafter, on December 11, 1941, the states of Oregon, Washington, Idaho, Nevada, Utah and Arizona and the Territory of Alaska were designated a theatre of military operations as the Western Defense Command by order of the Secretary of War.

Before the outbreak of hostilities, in August, 1941, Congress had amended a statute² passed in

(1) Public Law 328, 77th Congress, United States Code Cong. Service, No. 9 (1941), p. 843.

1918 designedly to protect "war material" in time of war by placing under protection by punitive provisions "national-defense material", "National-defense premises" and "national-defense utilities", which are therein broadly defined.³

Thereafter, the President of the United States, by Executive Order Number 9066, after reciting that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined" by this statute, authorized and directed the [17] Secretary of War and military commanders designated by him to prescribe military areas in such locations and of such boundaries as might be desired, from which all persons might be excluded and subject to whatever restrictions might be imposed upon the right of persons to enter, remain in or leave, such areas. Lieutenant General John L. DeWitt was designated by the Secretary of War to exercise the authority granted by the Executive Order for the Western Defense Command.

Thereafter, claiming to act pursuant to the

(2) Act of April 20, 1918, 40 Stat. 533, 50 USCA, 101-103.

(3) 50 USCA 104, Act of August 21, 1941, 55 Stat. 655. A previous amendment was Act November 30, 1940, 54 Stat. 1220.

Executive Order and the authority vested in him by the Secretary of War, General DeWitt, by Public Proclamation No. 1, on March 2, 1942, declared certain portions of the Western Defense Command, because of its liability to attack or to attempted invasion and because it was subject to espionage and acts of sabotage, a military area "requiring the adoption of military measures necessary to establish safeguards against such enemy operations."

Certain areas were thereby designated as "Military Areas" and "Military Zones." It was thereby announced that "such persons or classes of persons as the situation may require" would, by subsequent proclamation, be excluded from certain of these areas, and further declared that with regard to other of said areas "certain persons or classes of persons" would be permitted to enter or remain therein under certain regulations and restrictions to be subsequently prescribed. Further "Military Areas" and "Military Zones" are designated by the Proclamation No. 2, of March 16, 1942.

Public Act 503, passed by Congress and approved by the President March 21, 1942, made it a criminal act for any person "to enter, remain in, leave or commit any act in any Military Area or Military Zone established pursuant to the Executive Order of the President by any military commander designated by the Secretary of War", contrary to the restrictions applicable to any such area if such person knew of the existence, application, and extent, of the restriction.

On March 24, 1942, Public Proclamation No. 3 was issued by General DeWitt, reciting "as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones * * *". This regulation established a curfew law for such enemy aliens and such persons of Japanese ancestry within certain of the zones above indicated. [18]

Minoru Yasui, the defendant, is the son of an alien Japanese father and mother. He was indicted April 22, 1942, on the ground that he had violated the curfew provisions of this proclamation. He pleaded "Not Guilty", waived a jury and was tried by the court. The evidence showed that Yasui was born at Hood River, Oregon, on October 19, 1916. On March 28, 1942, at 11:20 P.M., Yasui walked into the police station in Portland, Oregon, within one of the designated areas. He admits this fact and that he knew it was a violation of the regulation. His contention was and is, however, that he could not be convicted therefor because he was a citizen of the United States and that the regulation is, as to him, unconstitutional and void.

It is necessary for the United States in a criminal case, not only to establish the material facts beyond a reasonable doubt, but also to establish that there was an applicable legal basis for the prosecution. This court, established under the Constitution of the United States, must determine jurisdiction at the threshold by pointing to an adequate

and valid law, making punishable the acts done by defendant.

Although in the ultimate there is but one question which the court is called upon to decide and that is the guilt or innocence of Yasui, which can be determined by a single unsupported pronouncement of judgment, the argument herein has taken a wide range and such claims have been made that even at the risk of having the utterances called dicta, as is the current fashion regarding those in the Milligan⁴ case, the court should reveal the foundation of the findings. Grave danger exists that otherwise the findings might be used as a basis for unwarrantable action in other times.

The fact that the problem of the Japanese citizen and alien, resident in the states bordering the Pacific, has been solved by the army officers in charge, aided by the acquiescence of the vast majority of the American citizens of that race, does not relieve the court from the responsibility of determining the case as here presented.

The American officer does not desire to found a military dictatorship but to protect his country from the perils of war. Both by training and choice he is first a citizen and second a soldier. Normally, therefore he is [19] an adherent even in times of stress to the Constitution and a representative form of government. General DeWitt is an able and resourceful officer. It is certain he has no inclination, even though faced with a serious

(4) *Ex Parte Milligan*, 71 U.S. 2.

situation, to violate the fundamental law of the country.

As a premise, then, the existence of a war in which victory is a vital necessity to assure survival of the freedom of the individual guaranteed by the Federal Constitution, must be predicated. The conditions and necessities of preparation for modern war had previously been recognized by this court.⁵ The areas and zones outlined in the proclamations became a theatre of operations, subjected in localities to attack and all threatened during this period with a full scale invasion. The danger at the time this prosecution was instituted was imminent and immediate. The difficulty of controlling members of an alien race, many of whom, although citizens,

(5) "In this present period, the wars undeclared under the law of nations, the disregard of international convention, the hostile concentrations cloaked by manifestos of pacific intention, the elimination of time and distance as ponderable factors, the lightning strokes of modern arms are actualities over which the words 'at peace' cannot be permitted to tyrannize in making judgments." *Stone vs. Oscar Christensen*, 36 F. Supp. 739 (D. C. Oregon) (Fee), December 23, 1940. It was there held before declaration of war that the draft act of 1940 was constitutional in order to provide for the national defense.

Ex Parte Owens, unreported, (D. C. Oregon) (McColloch), here it was held that one under eighteen years of age who had enlisted in the National Guard of the State of Oregon without parents' consent could be inducted and compelled to serve after the mobilization in federal service. Affirmed on a different point, *Owens vs. Huntling*, 115 F. (2d), 160.

were disloyal with opportunities of sabotage and espionage, with invasion imminent, presented a problem requiring for solution ability and devotion of the highest order.

It must be remembered, however, when dealing with the claims made by writers who are not charged with the responsibility of maintaining the structure of the fundamental law and the guarantees of the liberty of the individual, that the perils which now encompass the nation, however imminent and immediate, are not more dreadful than those which surrounded the people who fought the Revolution and at whose demand shortly thereafter, the ten amendments containing the very guarantees now in issue were written into the Federal Constitution;⁶ nor those perils which threatened the country in the [20] War of 1812, when its soil was in the hands of the invader and the Capitol itself was violated; nor those perils which engulfed the belligerents in the war between the States, when each was faced with disaffection and disloyalty in the territory in its control. Yet each maintained the liberty of the individual.

In *Ex Parte Milligan*, *supra*, a citizen of the United States who had been tried, convicted and sentenced to death by military commission for con-

(6) "The first ten amendments were drafted by men who had just been through a war. The Third and Fifth Amendments expressly apply in war." Chafee, *Free Speech in the United States* (1941) 30.

spiracy and subversive measures against the federal government, applied for habeas corpus. He had at all times been a resident of the local state of Indiana, which was not at the time under occupation by any hostile troops, although it had been previously invaded and was then threatened with invasion.

When this case came before the Supreme Court of the United States, the whole field of the interrelation of the civil and military power was covered in the arguments of able counsel. The court in the opinion of necessity considered thoroughly and intentionally the foundation of military power over civilians. It was necessary there, as here, to determine whether a citizen, who is not a soldier, a prisoner of war, nor a spy in a loyal state not presently invaded, is subject to military jurisdiction, or whether as a non-belligerent he must be tried by civil courts solely for offenses designated by Congress. The direct question in this case was not there involved, because trial by a military commission is not here attempted. But the opinion in all its phases is binding upon this court. It cannot be disregarded. The expressions cannot be brushed aside as dicta, except by a process of wishful rationalization.

The rationale of both the main and concurring opinion is that the civil power in this country is supreme. Neither directly nor indirectly can the military power become dominant. The Constitution, laws and treaties of the United States control.

Nor is the situation changed by the incidence of war. This doctrine has been re-affirmed many times by the Supreme Court of the United States,⁷ citing the Milligan case. [21]

But it is urged without making a distinction between power based upon military necessity and power based upon Congressional action that in time of war the constitutional guarantees must be re-interpreted. If this be a plea for the exercise of arbitrary power, it is not conceived that it has the support of the military authorities, and, certainly, has not the support of the decided cases. The argument proceeds upon the basis that the disposition of the Supreme Court now is to overlook the constitutional limitations when confronted with an emergency.

(7) Sterling vs. Constantin, 287 U.S. 378; Home Building & Loan Association vs. Blaisdell, 290 U.S. 398, 426.

"We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial. We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in *Ex parte Milligan*, *supra*."

Ex parte Quirin, Supreme Court of the United States, October 29, 1942, p. 9.

It is true that the modern tendency is to refuse to draw tight the circle of inviolability about rights of property⁸ under the due process clause and to change the emphasis in relations of labor and capital.⁹ But there is no indication either in peace or war of a disposition to wear away the fundamental guarantees of liberty of the individual. Indeed, the emphasis, if not for extension, by construction at least has been strongly upon increasing vigilance in regard thereto.¹⁰ Here no mere property rights are involved, but the right of personal freedom of action.

The court speaks distinctly in the Milligan case regarding the re-interpretation of the guarantees because of the perils of war.

"It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in time of war the commander of an armed force (if in his opinion the exigencies of the

(8) *United States vs. Carolene Products Co.*, 304 U.S. 144; *Home Building & Loan Association vs. Blaisdell*, *supra*, 448; *Block vs. Hirsh*, 256 U.S. 135, 145; *Hamilton vs. Kentucky Distilleries Co.* 251 U.S. 146, 156-7.

(9) *Lauf vs. E. G. Shinner & Co.*, 303 U.S. 323, 325; *National Labor Relations Board vs. Pacific Greyhound Lines, Inc.* 303 U.S. 272; *New Negro Alliance vs. Sanitary Grocery Co.*, 303 U.S. 552.

(10) *Johnson vs. Zerbst*, 304 U.S. 458; *Hague vs. Committee for Industrial Organization*, 307 U.S. 496; *Thornhill vs. Alabama*, 310 U.S. 88.

country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States." [22]

"If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules."

"The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure to-

gether; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."

The question now before this court is whether a military commander has the right to legislate and pass statutes defining crimes which will be enforced by the civil courts. A power to so legislate validly and to execute such laws makes the possessor thereof supreme. The Constitution vests the legislative power in Congress. It is axiomatic that so long as no form of military jurisdiction is in force over the particular locality or person, the civil law will prevail.

The classical definitions of various situations where ordinary civil law does not apply is given in the concurring opinion in *Ex parte Milligan*, as follows:

"There are under the Constitution three kinds of military jurisdiction; one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of those may be called jurisdiction under Military Law, and is found in acts of Congress prescribing rules and ar-

ticles of war, or otherwise providing for the government of the national forces; the second may be distinguished as Military Government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated Martial Law Proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.” [23]

This is not a case here prosecuted under “military law” as above defined. Yasui holds a commission voluntarily accepted as a Second Lieutenant in the Officers Reserve Corps. By this voluntary surrender of his civilian status under certain circumstances Congress could have made him amenable to military law. But if so, he would have been tried by court martial, under an Act of Congress establishing the “Articles of War”.¹¹ An appeal to a civil court erected under the Constitution would

(11) 41 Stat. 804.

be improper.¹² Under the Articles of War, the right of the superior officer to legislate or establish rules and regulations for those under his command is clear. Violations of such orders are made punishable. While it is true this court has held that a civilian can be required to give military service involuntarily, at the call of his country and while upon induction into the service he becomes subject to military law, until inducted, the civilian does not owe obedience to army orders or proclamations.

Trial by military commission of spies, prisoners of war and civilians attached to the military forces is another exception to the rule that military law does not apply to civilians. In certain instances in case of spies it is recognized as applicable to civilians under the Articles of War.¹³ Precedents, furthermore, exist in our history for the trial of spies by military commission whether discovered in a

(12) Smith vs. Shaw, 12 Johnson 257; In re Kemp, 16 Wisconsin, 359; Ex parte Goldstein, (D.C.) 268 F. 431; United States vs. McIntyre, 9 Cir. 4 F. (2d), 823; See in re Egan, 5 Blatch. 319, 8 Fed. Case No. 4303. Ex parte Henderson, 11 Fed. Case No. 6349.

(13) The Articles of War seem to give specific legislative authority for trial by "Military Commission" under the situation. See Article 82, 41 Stat. 804, 10 USCA, Sec. 1554. United States ex rel Wessels vs. McDonald, 265 F. 754, app. dism. 256 U.S. 705. But see Op. Atty. Gen. 356 and see Arnand vs. United States, 26 Ct. Cl. 370.

military area or not.¹⁴ These explain the recent action of the Supreme Court of the United States in refusing *habeas corpus* to persons tried by military commission who had landed surreptitiously on the shores of this country and who were afterward captured in the interior.¹⁵ The fact that those who had some claim to American citizenship were [24] included in the number furnishes no precedent here. An American citizen in service of the enemy who comes through the lines of battle to land here is subject to the laws of war.¹⁶ It is to be noted that citizens residing in this country alleged to have

(14) The most notable was the case of Major Andre, the English confederate of General Arnold in the Revolution, whose sentence to death by military commission was approved by Washington and executed. See Argument of B. F. Butler, in the Milligan case, *supra*, 99-101, where this and other matters are cited. The broader implications contended for seem to have been there repudiated.

(15) *Ex parte Quirin*, *supra*.

(16) The doctrines of *Ex parte Milligan* are not repudiated by the *Quirin* decision. The *Milligan* case gives color to the doctrine that a "prisoner of war" can be tried in loyal territory in time of war by military commission; Page 131.

"We say 'enemy's country' because, under the recognized rules governing the conduct of a war between two nations, Cuba, being a part of Spain, was enemy's country, and all persons, whatever their nationality, who resided there were, pending such war, to be deemed enemies of the United States and of all its people." *Juragua Iron Company, Ltd. vs. United States*, 212 U.S. 297, 305-6.

assisted such persons were not tried by military commission but were indicted for treason.¹⁷

Another exception to ordinary civil rule prevails in war. The military to meet the emergency of the times, where the peril is too great to permit certain persons to go at large, are at times forced by the public danger to seize persons, citizens and alien alike, and to hold them and even to transport them long distances. History shows that in such instances the power of the courts has been defied.¹⁸ The rule of force alone is then applied. In the event that *habeas corpus* is sought, the question of whether this remedy is appositive must be judged under the Constitution and the civil law. If the person has been seized for an indictable offense and the usual processes have been followed, he can be held. It is only when the exercise of the writ has been illegally suspended in a given area or the courts have been closed that the military can postpone the application of the fundamental doctrines, unless the particular case fall within the exceptions.

Nor is this a situation where a "military government" could be erected. Oregon is not conquered territory nor hostile country. It is an area, the inhabitants of which are intensely loyal to the United States. In few portions of the country is the population as co-operative in the war effort. [25]

(17) The indictment and trial of alleged confederates have been reported in the press.

(18) See *Ex parte Merryman*, 17 Fed. Cas. 144 No. 9487 (C.C.Md.).

The application of military government in the states of this country has never been made except after the war between the states, when the area of the southern states was treated as territory conquered from a belligerent, and military governments were set up therein.¹⁹ The history of this experiment suggests that it be not repeated.²⁰

The present case does not then arise under "military law", nor can it be justified by doctrines relating to trial of military personnel by court martial, nor to trial of spies by military authority. The instant case relates to the power of the military

(19) Birkhimer, *Military Government and Martial Law*, (2d Ed.), Chapter XXIII.

(20) President Wilson, in the dark days of another war, when the peril of sabotage and espionage was as great, and the number of citizens of divided loyalty at least as great, expressed strong opposition to the enactment of a statute which would have divided this country into military districts subject to regulations adopted by appropriate military commanders. He wrote to Senator Overman, as follows:

" * * * I am heartily obliged to you for consulting me about the Court-Martial Bill, as perhaps I may call it for short. I am wholly and unalterably opposed to such legislation * * *. I think it is not only unconstitutional, but that in character it would put us nearly upon the level of the very people we are fighting * * *. It would be altogether inconsistent with the spirit and practice of America * * *, I think it is unnecessary and uncalled for. * * * " 8 Baker, Woodrow Wilson, *Life & Letters*, 100; Chafee *Free Speech in the United States*, *supra*, 38, Note 18.

commander to issue regulations binding indiscriminately upon citizens and alien, reserve officer, spy and civilian. Such power only is tolerated in the first instance if a state of "martial law" has been proclaimed by the proper authority and in the ultimate only if the facts prove the existence of the military necessity therefor.

"But when the military commander controls the persons or property of citizens who are beyond the sphere of his actual operations in the field, when he makes laws to govern their conduct, he becomes a legislator. Those laws may be made actually operative; obedience to them may be enforced by military power; their purpose and effect may be solely to support or recruit his armies, or to weaken the power of the enemy with whom he is contending. But he is a legislator still; and whether his edicts are clothed in the form of proclamations, or of military order, by whatever names they may be called, they are laws. If he have the legislative power conferred on him by the people, it is well. If not, he usurps it. * * * He is not the military commander of the citizens of the United States, but of its soldiers." [26]

"The military power over citizens and their property is a power to act, not a power to prescribe rules for future action. It springs from present pressing emergencies, and is limited by them. It cannot assume the functions of the statesman or legislator, and make provisions

for future or distant arrangements by which persons and property may be made subservient to military uses. It is the physical power of an army in the field, and may control whatever is so near as to be actually reached by that force in order to remove obstructions to its exercise.”²¹

A military commander under the Constitution is given no power of legislation. It follows, therefore, in this case, that the regulations issued by his sole authority, even though it be established that the territory on the Pacific Coast of the United States has been invaded and is in imminent danger of invasion, confer upon the military commander no power to regulate the life and conduct of the ordinary citizen,²² nor make that a crime which was not made a crime by any act of Congress. The Congress of the United States is in session and consists of the elective representatives of the people. To this body, therefore, alone is committed its ordinary power of passing laws which govern the conduct of citizens, even in time of war.

(21) Davis “Executive Power” (October 1862), quoted in Birkhimer’s Military Government and Martial Law, (2d Ed.), Section 368.

(22) “ * * * the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established.” Ex parte Quirin, *supra*, 21.

It is true that martial law, when instituted, is complete and represents the arbitrary will of the commander,²³ controlled only by consideration of strategy, tactics and policy and subject only to the orders of the President. Under martial law the commander can seize men and hold them in confinement without trial. He can try them before a military commission for a violation of the laws of war or his own regulations. Finally, he can [27] legislate and bind citizens and others by rules established by him and governing their conduct in the future.²⁴

Whether declared by the President or by Congress or by the military commander or existing on

(23) See arguments in the Milligan case. It is true as heretofore pointed out, the exercise of will is restrained in the American officer by a sense of ultimate civil responsibility. See Birkhimer, Military Government and Martial Law, (2d Ed.), Chapter XIX, which contains an exposition of this attitude. Public opinion in the governed territory is perhaps a restraining force in certain fields, but is not presently a factor here.

(24) Under the Organic Act of Hawaii, the Governor, on December 7, 1941, turned the control over to the military the courts closed to re-open under military direction for certain purposes only and the territory is now completely governed by the military. The necessity there is apparent, but the consequences support the statements above.

Proclamation of defense period, Joseph B. Poin-
dexter, Governor, December 7, 1941.

Proclamation of martial law, Joseph B. Poin-
dexter, Governor, December 7, 1941, Honolulu Star-
Bulletin, Dec. 8, 1941.

Proclamation of acceptance of military rule, Lieu-

account of conditions, the only basis for martial law is military necessity.²⁵

tenant General Short, December 7, 1941, Honolulu Star-Bulletin, Dec. 8, 1941.

General Orders No. 4, December 7, 1941, Honolulu Star-Bulletin, Dec. 9, 1941.

General Orders No. 29, December 16, 1941, Honolulu Star-Bulletin, Dec. 19, 1941.

General Orders No. 57, January 27, 1942, Honolulu Star-Bulletin, Jan. 30, 1942.

(25) Letter President Lincoln to Secretary Chase, September 2, 1863:

"Knowing your great anxiety that the Emancipation Proclamation shall now be applied to certain parts of Virginia and Louisiana which were exempted from it last January, I state briefly what appear to me to be difficulties in the way of such a step. The original proclamation has no constitutional or legal justification except as a military measure. The exemptions were made because the military necessity did not apply to the exempted localities. Nor does that necessity apply to them now any more than it did then. If I take the step, must I not do so without the argument of military necessity, and so without any argument except the one that I think the measure politically expedient and morally right? Would I thus not give up all footing upon Constitution or law? Would I not thus be in the boundless field of absolutism? Could this pass unnoticed or unresisted? Could it fail to be perceived that without any further stretch I might do the same in Delaware, Maryland, Kentucky, Missouri, and Tennessee, and even change any law in any state? Would not many of our own friends shrink away appalled? Would it not lose us the elections, and with them the very cause we seek to advance?"

There is a pernicious doctrine known as "partial martial law", which was developed by an ambitious governor as a method of dictating regulations to the people of a state uncontrolled by the Constitution or laws thereof.²⁶ It constituted an expression of his arbitrary will. The long history within recent years of the use of arbitrary power in the guise of martial [28] law by the executives of the states, sometimes upon the flimsiest pretext,²⁷ and occasionally, with the unjustifiable support of the judiciary state²⁸ and federal, in subversion of the rights and personal liberty of the citizen, indicates that a fear that the state officials might in some future time attempt further violations is at least justifiable.

These perversions of martial rule used by governors of the states in industrial and social conflict

(26) Governor Allen of Louisiana acting under express directions of Senator Huey Long, N. Y. Times, Aug. 6, 1934, p. 2, col. 6. See Commonwealth ex rel. Wadsworth vs. Shortell, 206 Pennsylvania, 165, 170-1.

(27) See Miller vs. Ribers, 31 F. Supp. 540; Patten vs. Miller, 190 Georgia, 165; Hearon vs. Calus, 178 South Carolina, 381; Allen vs. Oklahoma City, 175 Oklahoma, 421; United States vs. Phillips, 33 F. Supp. 261.

(28) State ex rel. Mays vs. Brown, 71 West Virginia, 519; Ex parte Jones, 71 West Virginia, 567.

(29) United States ex rel. Palmer vs. Adams, 26 F. (2d) 141, 144; Bishop vs. Vandercrook, 228 Michigan 299, 309.

[Printer's Note: Footnote 29 not indicated on copy.]

to satisfy a personal need for uncontrolled power in given situations, wherein the civil rights of individuals were swept away by legislation or fiat dictated by an individual, indicate that in these trying days of war, limits must be set to military authority exercised in the name of necessity, lest we lose the liberties for which we fight.

"But it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation." *Ex parte Milligan*, *supra*, 126.

The doctrine that there can be a partial martial law, unproclaimed and unregulated except by the rule of the military commander, expressed in orders or regulations proclaimed by him and enforced in the civil courts in a territory within the continental limits of the United States and at the time not occupied by any foreign foe, belongs in the category of such perversions, and cannot be justified by any sound theory of civil, constitutional or military law. Its only justification lies in the doctrines of "state of siege" proclaimed by military commanders, generally speaking, in the governments of Europe. For a state of the United States or any portion thereof to be placed, in any essential function, or for citizens of the United States to be placed with regard to their fundamental rights, subject to the will of the commander alone, how-

ever well designed for their protection, [29] without any of the preliminaries above suggested,³⁰ up to the time when utter necessity requires the abolition of all civil rule for the preservation of the government, would seem to be a complete surrender of the guarantees of individual liberties confirmed in the Constitution of the United States.

The confusion in the authorities seems to arise in a failure to differentiate between a case where martial law is properly declared in civil disturbances³¹ and a case where the military is called upon to aid the civil power. In the latter case no special attributes³² should be ascribed either to the soldier or the commander. Ordinary civil law is enforced by a greater power.

"Thus the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is the power to wage war successfully and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties."

(30) See *Manley vs. State*, 62 Texas Cr. 392, *Manley vs. State*, 69 Texas Cr., 502.

(31) See *Moyer vs. Peabody*, 212 U.S. 78.

(32) *Constantin vs. Smith*, 57 F. (2d), 227, 238, 241; *Bishop vs. Vandercook*, *supra*; *Franks vs. Smith*, 142 Kentucky 232; *Fluke vs. Canton*, 31 Oklahoma, 718; *Manley vs. State*, *supra*, 400.

Home Building and Loan Assn. vs. Blaisdell,
supra, 426.

The replacement of the statutes of Congress, the courts and civil authority in this area can then be effected only by "martial law proper", under the definitions given. What then is the test? The court in the Milligan case says:

"It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; * * *. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be 'mere lawless violence.'"
Ex parte Milligan, supra, 127. [30]

The concurring opinion did not controvert this holding. The concurring judges gave support to this doctrine, but held that Congress if the necessity were legislatively found, could declare martial law, as could the President under given circumstances.

It was vital to find whether "martial law proper" prevailed in Indiana for the determination of the case. If it prevailed, whether declared by Congress or the President, or in existence because of military necessity, a citizen could have been tried by military commission, although he was neither prisoner of war, spy, a resident of enemy country nor attached to the military forces. Otherwise, he could not. The recital by the court of the facts shows that the peril was extreme,³³ but held that martial law was not in effect.

No designation need be given to acts which the military sometimes are required to commit under the stress of war and of military necessity, such as the arrest and ejection of a federal judge from his lines by Andrew Jackson,³⁴ the refusal of General Cadwalader under Lincoln's order to obey the writ of the federal circuit court,³⁵ the seizure of Vallan-

(33) Open resistance to the measures deemed necessary to subdue a great rebellion, by those who enjoy the protection of government and have not the excuse even of prejudice of section to plead in their favor, is wicked; but resistance becomes an enormous crime, when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States. Conspiracies like these, at such a juncture are extremely perilous; and those concerned in them are dangerous enemies of this country * * *. *Ex parte Milligan*, supra, 130.

(34) See *Ex parte Milligan*, supra, 52.

(35) *Ex parte Merryman*, supra.

digham,³⁶ of Milligan.³⁷ The fact that a conscientious commander commits such acts at times to perform his mission does not always render them lawful. The power to suspend the writ of habeas corpus is given, so that a civil court cannot pass on legality of such acts in time of public danger. The rule of the commander is the rule of force. He may have the physical power to seize, to hold, to confine the individual and to disobey the orders of the court. It may be his military duty. Whether he has made himself civilly responsible for illegal acts can only be tried after the event, when the rule of force has ended. But such acts, however necessary, establish no doctrine of qualified martial law and are, in instances, unjustified by law. [31]

But it is too clear for debate that martial law does not come into existence under constitutional government until utter necessity compels the investment of one man with the power of life and death over citizen and soldier alike in a given area.³⁸ It is the law of self-defense among nations.

(36) *Ex parte Vellandigham*, 28 Fed. Cas. 814, No. 16,816.

(37) *Ex parte Milligan*, *supra*.

(38) In Hawaii at the present time, pursuant to a proclamation of martial law, military commissions for violations of the laws of the United States or the Territory or the "rules, regulations, orders or policies of the military authorities" adjudge punishment commensurate with the offense committed and "may adjudge the death penalty in appropriate cases". General Order No. 4, Honolulu Star-Bulletin, Dec. 9, 1941.

Like self-defense, it is a use of elemental force sanctioned by common law, initiated solely by stark necessity and vanishing when the necessity no longer exists.³⁹ If military necessity does not exist, neither the declaration of war nor the proclamation of martial law can justify acts contrary to ordinary law.⁴⁰ On the other hand, where there is no declaration of martial law by Congress or the President or by the General in this area, and when there has not even been a suspension of the writ of habeas corpus, there is a strong implication that in the judgment of the political authorities no necessity justifying such action exists.

While a war is in progress, the question of whether military necessity requires the closing of the courts and the abrogation of civil authority for the time being and in a certain area, is one for the political or executive departments of the government. There should be a clear line of demarcation drawn by the political agencies between government by fiat, and by law.

The existence of military necessity is justifiable under a particular set of circumstances. In the event the military commander has taken measures under the guise of martial law when the military necessities did not actually require, he has been held civilly liable after the war is finished.⁴¹ [32] But it is

(39) *Ex parte Milligan*, *supra*.

(40) *Sterling vs. Constantin*, *supra*.

(41) The bright star in the crown of Andrew Jackson was the fact that although justly flushed

obrious during the clash of arms the evidence of military necessities cannot be adduced in a civil court. Therefore, such a tribunal should not be called at that time to declare whether the necessity exists.⁴² When the Congress in session has not declared martial law and the President has not recognized the existence of martial law by executive order closing the courts and even the military commander has not proclaimed martial law is in effect, a court cannot take the responsibility in view of the clear declaration of the Supreme Court of the United States that a martial law is not in effect unless the courts are closed. While it is true that

with triumph at New Orleans, he paid a fine in the federal court, because he had arrested the judge thereof upon the ground that the latter was interfering with the military security of his force. Actually, at the time of the ejection, peace had been proclaimed and, therefore, the military necessity did not exist. Jackson apparently recognized that he had no legal right to act on appearances where the fact did not justify action. He was brought into court on a charge of contempt before the same judge, who fined him. Jackson paid the fine. The apologists cite the fact, that Congress subsequently made Jackson whole for this expenditure in the last year of his life and after he had been twice President of the United States, as an argument for the existence of the power to act without sanction of actual necessity. See *Arguments Ex parte Milligan*, *supra*, 52, 94-7.

(42) See *Consolidated Coal & Coke Co. vs. Beale*, 282 F. 934 (D.C.) where it is said that a court cannot make a determination in advance that troops are necessary to quell an insurrection.

neither a declaration of the President,⁴³ nor of Congress,⁴⁴ nor of the military commander [41] would be binding upon a court eventually, if the necessity did not exist, until some political or military authority has faith enough in the position to proclaim a state of martial law, a court which is in fact open, should not find the existence of necessity as a fact.

All this points to the vital inconsistency here developed between the action taken by the civil authorities in a federal court bound by and acting under the guarantees of the Constitution of the United States and its amendments, and the claim that a military necessity has arisen so vital that its exigencies demand that citizens of the United States be confined to their places of lodging at hours dictated by a military commander. If such an emergency exists, and it may well be that it does, the Congress of the United States or the Executive, in the months since Pearl Harbor, could [33] have declared martial law or at least suspended the writ of habeas corpus in view of the situation. If the emergency exist, the military commander may be justified in seizing the body of Yasui and removing him from the military areas or zones. Of a certainty, if the military commander can allow a civil court to remain open to try violations of his orders, without support by force, military necessity cannot be so imperative that the fundamental safeguards must be abandoned. So long as the courts of the

(43) See *Sterling vs. Constantin*, *supra*.

(44) See *Ex parte Milligan*, *supra*.

United States are open, these tribunals are bound by Constitution and treaties of the United States and legislation of Congress. The proclamations or regulations of a military commander cannot be enforced by such tribunals.⁴⁵

But it is contended that there was an adoption of the proclamations of the military commander because the act of Congress passed three days earlier prescribed penalties for acts done in violation of the regulations issued with reference to certain areas or zones. Congress itself could not make constitutionally a distinction relating to the conduct of citizens based on their color race.⁴⁶ Such an intention is not to be found inadvertently.⁴⁷ Congress itself could not in loyal territory uninvaded make

(45) Marshall, C. J., says in considering a motion for a writ of habeas corpus in *Ex parte Bollman*, 8 U.S. 74, 93, where petitioner was charged with treason, "As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the Constitution, or by the laws of the United States. * * * Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."

(46) See *Retirement Board vs. Alton R. Co.*, 295 U.S. 330; opinion of the present Chief Justice, *Hague vs. Committee for Industrial Organization*, *supra*, 519. See also *Yick Wo vs. Hopkins*, 118 U.S. 369; *Buchanan vs. Warley*, 243 U.S. 60.

(47) "The issue is fraught also with great international significance in terms of our relations with colored peoples generally." McWilliams, "Moving the West-Coast Japanese", *Harper's Magazine*, September, 1942, Vol. 185, No. 1108, pages 359, 369.

acts of citizens criminal simply because such acts were in violation of orders to be issued in the future by a military commander.⁴⁸ Congress could have declared martial law [34] and thereupon the courts might have become adjuncts or agencies of the General commanding. Under these circumstances he might have had the power to legislate by regulation and create classes of citizens.

There are valid reasons for control of citizens of Japanese ancestry, but the test is color and race. An equally valid foundation can be found for control of persons of Italian, German⁴⁹ and Irish ancestry. A real basis in necessity might be found in the imposition of such regulations upon the eastern frontier after the landing of persons of German ancestry who were harbored in this country. But the history of this country contains too many examples of loyalty of persons of foreign extraction to justify any blanket treatment. The precedent, if valid, can be made to justify exile or detention of any citizen whom a military commander desires in a loyal state not under threat. If the military necessity existed and martial law was actually in effect, justification might be pleaded.

There are suggestions that control by curfew or

(48) Schechter Poultry Corporation vs. United States, 295 U.S. 495.

(49) The literature of the last World War contains abundant proof.

(50) See Act April 16, 1918 C. 55; 40 Stat. 531; 50 USCA, Sec. 21.

[Printer's Note: Footnote 50 not indicated on copy.]

detention or exile of civilians as to a given area interferes with a lower order of rights than the right to life. Such doctrine sounds strange in this country, with schoolbook memories of Jefferson's doctrine of revolution and Patrick Henry's preference for death.

This court, while not operating as an adjunct of a military commander, must apply ordinary law and protect the rights of a citizen in a criminal case. If Congress attempted to classify citizens based upon color or race and to apply criminal penalties for a violation of regulations, founded upon that distinction, the action is insofar void.

The power of Congress, however, during time of war over aliens of a country which is hostile to the United States is almost plenary, as is that of the President by a series of acts dating to the foundation of the Union.⁵¹ While in ordinary times such persons are entitled to the "equal protection of [35] the laws", when their country is at war with the United States, Congress or the President may intern, take into custody, restrain and control all enemy aliens within the territorial limits of the United States,⁵² and neither are restrained by any

(51) Act July 6, 1798 c.66 Secs. 1, 2, 3, 1 Stat. 577
R.S. Secs. 4068-4070. 50 USCA, Secs. 21-24.

(52) In 1813 upon petition for habeas corpus, the executive order requiring enemy aliens who were within 40 miles of tidewater to retire beyond that limit was upheld. Lockington's Case, Brightly, N. P. (Pa.) 269; Lockington vs. Smith (C.C. Mich.) 1848, 1 Pet. C.C. 466, Fed. Case. 8448; 50 USCA, Sec 21, p. 11.

constitutional guarantees from such action.⁵³ While the orders of General DeWitt, therefore, were void as respects citizens, unquestionably from the history of the proclamations, Congress would be well on notice that the General might intend to establish regulations relating to enemy aliens within the areas designated by the previous proclamations. The regulations, which make these acts crimes, by adoption thereof by act of Congress are thus valid with respect to aliens.

The only question now for the court to determine is as to whether Yasui, the defendant, is a citizen or an enemy alien.

Under the Constitution of the United States, Yasui, by virtue of his birth in the territorial limits of the United States and notwithstanding the fact that his parents were alien Japanese incapable of naturalization in the United States, had conferred upon him the inestimable right to citizenship in the United States.⁵⁴ By international law, however, he was also a citizen of Japan and subject of the Emperor of Japan. According to international law, also, he had, upon attaining majority but not before, the right of election as to whether he would accept citizenship in the United States or give his

(53) *DeLacey vs. United States*, 9 Cir. 249 F. 625; *Minotto vs. Bradley* (D.C. Ill.), 252 F. 600; *Halpern vs. Commanding Officer*, 248 F. 1003. See also *Deutsch-Australische &c. vs. United States*, 59 Ct. Cls. 450. See Proclamation No. 1364, April 6, 1917.

(54) *United States Wong Kim Ark*, 169 U.S. 649.

allegiance to the Emperor⁵⁵ to whom he was bound by race, the nativity of his parents and the subtle nuances of traditional mores engrained in his race by centuries of social discipline.

While, therefore, Congress might have set up tests or presumptions whereby the initiation or continuance of the relationship of citizenship in persons who held the dual status during minority might have been tested, as [36] it has done in case of naturalized citizens, or might have permitted segregation until evidence of citizenship were produced, no such intention is apparent in the legislation.

This election is a mental act.⁵⁶ The choice which

(55) Perkins, Secretary of Labor vs. Elg, 307 U.S. 325; Perkins, Secretary of Labor vs. Elg, 99 F. (2d) 408; In re Arla Marjorie Reid, 6 F. Supp. 800; United States vs. Reid, 73 F. (2d) 153.

(56) "In cases of double allegiance, the child when he becomes of age 'is required to elect between the country of his residence and the country of his alleged technical allegiance. Of this election two incidents are to be observed; when once made it is final, and it requires no formal act, but may be inferred from the conduct of the party from whom the election is required.'" Moore International Law Digest, Volume III, pages 545, 546, Section 430. Mr. Porter, Acting Secretary of State to Mr. Winchester, Minister to Switzerland, September 14, 1885, Fro. Rel. 1885, 811.

See Banning vs. Penrose (D.C.), 255 F. 159, where considering a case of a person who had become naturalized here and returned to the country of his nativity, "It is a question more of intention than anything else."

exists in the mind of a person is exemplified by acts. The intention, however, to make an election can be discovered by a tribunal as can criminal intent, knowledge or any other mental state. Notwithstanding the expression of some liberal authorities, tender in times of peace to preserve civil rights, such a mental state may be found in a criminal case contrary to the sworn evidence, protestations and declarations of a defendant.

The evidence in this case shows that during the minority of the defendant he made with his parents a trip to Japan when he was about nine years old and remained there during the summer vacation, visiting his grandfather, who was a resident of Japan and a subject of the Japanese Emperor. He attended a Japanese language school in the United States and apparently became proficient in speaking the Japanese language, which he testified was used to considerable extent in his own home. His further education was in the public schools and in the University of Oregon, where he received both an arts and a law degree. During the time that he was taking his arts course at the University, he took the course in military training prescribed and, unquestionably, compulsory. Therefore, upon his graduation with acceptable standards he received a commission as Second Lieutenant in the Officers Reserve Corps, and upon acceptance thereof, took the oath of allegiance to the United States. [37]

Such acts were all during minority and, although they may indicate tendencies, are not evidence of

the election to accept citizenship in the United States or allegiance to the Japanese Emperor. After his majority, he continued in residence in this country, a circumstance which all agree raises an inference that he intended to claim citizenship here. He likewise testified that he voted in the elections, which is another factor inviting attention. It must be remembered, however, that he was still a student in the University of Oregon and received his degree in 1939. Residence for the purpose of education does not ordinarily contain any inference as to intended domicile or citizenship.

The record shows that the father of the defendant was decorated by the Emperor of Japan. Within a few months after Yasui had been admitted to the Bar of the State of Oregon, he was, at the instigation of his father, employed by the Consulate General of Japan at Chicago.

While so employed, Yasui followed the orders of the Consulate General of Japan and made speeches, setting forth the philosophy and purposes of the military caste of Japan as propaganda agent for the Emperor. While in this position, he was registered twice by the Consulate General as a propaganda agent for a foreign power, pursuant to the regulations issued by the State Department of the United States. It is true that he testifies that there was an American citizen named Murphy, presumably not of Japanese extraction, who was employed in the same work, but we are not concerned here with the employment of Murphy or his purposes

or the innocence of his intention. Obviously, he had no election to make. The question before the court is as to what election Yasui made.

Yasui remained as a propaganda agent until after the declaration of war by this country against Japan and after the treacherous attack by the armed forces of Japan upon territory of the United States in the Islands of the Pacific.

The court thus concludes from these evidences that defendant made an election and chose allegiance to the Emperor of Japan, rather than citizenship in the United States at his majority. The court concludes that he served [38] the purpose and philosophy of the ruling caste of Japan as a propaganda agent because he could speak English, and only resigned when it seemed apparent that he could no longer serve the purposes of his sovereign in that office, but could do better execution in the event he could be commissioned an officer in the armed forces of the United States on active service.

Since Congress provided for the punishment of persons violating the proclamations of the commanding officers, and since Yasui is an alien who committed a violation of this act, which included by reference the regulations of the commander referring to aliens, the court finds him guilty.

[Endorsed]: Filed November 17, 1942. [39]

And afterwards, to wit, on Wednesday, the 18th day of November, 1942, the same being the 15th

Judicial day of the Regular November, 1942, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [40]

In the District Court of the United States
for the District of Oregon

November 18, 1942

No. C-16056

UNITED STATES OF AMERICA

vs.

MINORU YASUI

SENTENCE

Indictment?

Public Proclamation No. 3 of the Western Defense Command and Public Law No. 503, 77th Congress approved March 21, 1942.

Now at this day comes the plaintiff by Mr. Carl C. Donaugh, United States Attorney, and Mr. Charles S. Burdell, Special Assistant to the Attorney General, and the defendant, above named, in his own proper person and by Mr. John A. Collier, of counsel; and the Court having heretofore found the said defendant guilty as charged in the indictment herein, and this being the day set for passing of sentence,

It Is Adjudged by the Court that the defendant

Minoru Yasui is guilty of the offense of deliberately, wilfully and voluntarily committing an act in an area designated as a military area by a military commander, said defendant being a person of Japanese ancestry.

Whereupon, the said defendant, waiving time for passing sentence, is asked if he has anything to say why sentence should not now be pronounced against him, and no sufficient cause being shown,

It Is Further Adjudged that the said defendant, Minoru Yasui, do pay a fine of Five Thousand Dollars and be imprisoned for a term of One Year and from and after the expiration of said term until said fine be paid; that said defendant be committed to the custody of the Attorney General of the United States or his authorized representative who will designate the place of confinement of said defendant; and that said defendant stand committed until this sentence be performed or until he be otherwise discharged according to law.

Dated this 18th day of November, 1942, at Portland, Oregon.

JAMES ALGER FEE
Judge

[Endorsed]: Filed November 18, 1942. [41]

And Afterwards, to wit, on Tuesday, the 15th day of December, 1942, the same being the 40th Judicial day of the Regular November, 1942, Term of said

Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [42]

[Title of District Court and Cause.]

**ORDER EXTENDING TIME TO FILE BILL
OF EXCEPTIONS**

On application of the defendant, it is

Ordered by the Court that the defendant, appellant in the appeal filed in this case, may have until the 9th day of January, 1943, within which time to procure to be settled and filed with the Clerk of this Court a Bill of Exceptions.

Dated this 15th day of December, 1942.

JAMES ALGER FEE
District Judge

[Endorsed]: Filed December 15, 1942. [43]

And Afterwards, to wit, on the 6th day of December, 1942, there was duly Filed in said Court, a Stipulation designating contents of record on appeal, in words and figures as follows, to wit: [44]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated between the plaintiff and the defendant that the Clerk of the Court shall in-

clude in the record on appeal in this cause, the following documents:

Indictment

Stipulation re Amendment of Indictment

Plea

Record of Trial June 12, 1942

**Order Overruling Defendant's Motion for a
Verdict and The Verdict of the Court**

Judgment

**Order Extending Time for the Signing and
Filing of Bill of Exceptions**

Bill of Exceptions

Assignments of Error

This Stipulation.

Dated this 6th day of January, 1943.

CARL C. DONAUGH

United States Attorney

E. F. BERNARD

Attorney for Defendant

[Endorsed]: Filed January 6, 1943. [45]

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD**

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of
the United States for the District of Oregon, do

hereby certify that the foregoing pages numbered from 1 to 45 inclusive, constitute the transcript of record on appeal from a judgment and sentence of said Court in a criminal cause therein numbered C-16056, in which the United States of America is plaintiff and appellee, and Minoru Yasui is defendant and appellant; that said transcript has been prepared by me in accordance with the stipulation filed by said appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody, prepared in accordance with the said stipulation and rules of Court.

I further certify that I am transmitting with said transcript of record on appeal, the original Bill of Exceptions and the original Assignment of Errors filed in said cause by the said appellant.

I further certify that the cost of the foregoing transcript is \$5.00 for filing Notice of Appeal, and \$21.80 for comparing and certifying the within transcript, making a total of \$26.80 and that the same has been paid by the said appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 8th day of January, 1943.

[Seal]

G. H. MARSH

Clerk [46]

**In the District Court of the United States
For the District of Oregon****No. C-16056****UNITED STATES OF AMERICA,****Plaintiff,****vs.****MINORU YASUI,****Defendant.****BILL OF EXCEPTIONS**

Be It Remembered that on the 12th day of June, 1942, the above entitled cause came on regularly for trial in the District Court of the United States for the District of Oregon before James Alger Fee, Judge presiding, and sitting without a jury at the request and on the stipulation of the parties, the plaintiff appearing by Carl C. Donaugh, United States Attorney, J. Mason Dillard, Assisant United States Attorney, and Charles S. Burdell, Special Assistant to the Attorney General, and the defendant appearing by E. F. Bernard, his attorney, and Green & Landye (by B. A. Green and Will Roberts), Dey, Hampson & Nelson (by R. R. Morris and Jack M. McLaughlin), Hart, Spencer, McCulloch & Rockwood (by Omar C. Spencer and Manley B. Strayer), and Maguire, Shields, Morrison & Biggs (by Randall Kester), and Gus J. Solomon, all appearing as Amici Curiae.

After the opening statements of the attorneys for

the parties the plaintiff produced and examined as witnesses, William H. Maas, Vincent M. Quinn, Ray Mize, Dewart E. Wagner, Alan Davis, W. G. Everson and Leslie M. Scott. The defendant then testified in his own behalf and the plaintiff produced and examined in rebuttal Gerhard Goetz. No other witnesses were produced or examined nor was any testimony given, save and except by the witnesses herein mentioned, and a transcript of all the testimony given or [47] offered throughout the trial, and of all the proceedings had at the trial, except the ruling of the court on the defendant's motion for a judgment and the exceptions to the ruling taken by the defendant and allowed by the court, is hereunto attached, marked Exhibit "X" and made a part of this Bill of Exceptions.

The testimony of William H. Maas is set forth in full on pages 97 to 99 both inclusive of said Exhibit X; the testimony of Vincent M. Quinn is set forth in full on pages 100 to 108 both inclusive of said Exhibit X; the testimony of Ray Mize is set forth in full on page 107 and on pages 109 to 117 both inclusive of said Exhibit X; the testimony of Dewart E. Wagner is set forth in full on pages 117 to 122 both inclusive of said Exhibit X; the testimony of Alan Davis is set forth in full on pages 124 to 129 both inclusive of said Exhibit X; the testimony of W. G. Everson is set forth in full on pages 129 to 136 both inclusive of said Exhibit X; and the testimony of Leslie M. Scott is set forth in full on pages 136 to 140 both inclusive of said Exhibit

X; and the testimony of the defendant, Minoru Yasui, is set forth in full on pages 148 to 200 both inclusive of said Exhibit X; and the testimony of Gerhard Goetz is set forth in full on pages 201 to 206 both inclusive of said Exhibit X.

The exhibits introduced upon the trial of the case are as follows:

Government's Exhibit 2 which consists of a certified copy of a Foreign Official Status Notification and which, save and except as to the certificate which is not material to any question involved in the case, reads as follows:

"To be prepared in Duplicate

United States of America

Department of State

Foreign Official Status Notification

Division of Protocol June 21, 1941

Dept. of State

Date June 17, 1941

To the Secretary of State:

In accordance with applicable instructions attached hereto, and in connection with the act of June 15, 1917, the act of June 8, 1938, as amended, the act of June 28, 1940, [48] the act of July 1, 1940, and the act of September 16, 1940, I desire to submit the following information for the purpose of regularizing my official status and of claiming any exemption from registration accorded my status under the above-mentioned Acts and regulations promulgated thereunder:

JAPAN

1. Full name Minoru (First name) Yasui (Surname).

YASUI, MINORU

Do not write in this space

2. Name of government and agency or department thereof, if any, being served, Consulate General of Japan, at Chicago, Illinois.
3. Present nationality, American (U. S. citizen).
4. Previous nationality or nationalities, if any,
5. (a) Place of birth, Hood River, Oregon, United States of America.
(b) Date of birth, October 19th, 1916.
6. Port or place, date and manner of last arrival in United States and name of vessel, if any,
7. Status under which last admitted (check one): Immigrant Temporary visitor
Government official or employee. Other (Please describe)
8. Name used at time of last entry, if different from present name,
9. Name and nationality of husband or wife, and address if separate from signer's,
10. Names, ages and nationalities of children, and their addresses if different from signer's,
11. Names and nationalities of other relatives who are members of signer's household,
12. Names and nationalities of personal and domestic employees who are members of signer's household,

13. Capacity in which signer is now serving, giving title of position, if any, Secretary
14. Date of assumption of present duties in the United States, April 1, 1940
15. Detailed statement of signer's present and proposed activities, including the place or places of performance and for whom performed or to be performed, Secretarial Work, and Research: To Be Performed For the Consulate General of Japan, at Chicago, Illinois. [49]
16. Nature and place or places of occupation or employment during the last 5 years,
September, 1933 to June, 1939, student, at University of Oregon, Eugene, Oregon.
June, 1939 to November, 1939, ranch hand, Hood River, Oregon.
November, 1939 to April, 1940, practice of law, Portland, Oregon.
April, 1940 to present date, secretary, Consulate General of Japan, Chicago, Illinois.
17. Business address, or addresses if more than one, 1615 Tribune Tower, Chicago, Illinois.
18. Home address in the United States, or addresses if more than one,
1032 N. Dearborn St., Chicago, Illinois.
704-12th Street, Hood River, Oregon.
19. If declaration to become an American citizen has been filed, state the date and place of application,
20. If visiting in the United States temporarily as a tourist, or for personal business or pleasure,

or if passing in transit through the United States, the following additional information must be furnished:

- (a) Whether on private business or for pleasure and if on private business, state the agency, firm, or persons represented,
- (b) Temporary address in United States,
- (c) Date of proposed departure,
- (d) Port or place of proposed departure.
- (e) Country to which proceeding,

I will immediately notify the Secretary of State through appropriate channels of any change in my status, activities, or in the other information set forth in this notification.

MINORU YASUI

(Signature)"

A picture of the defendant is attached to said government's Exhibit 2.

Government's Exhibit 3, which consists of a certified copy of a letter dated March 2, 1942, from Henry L. Stimson to Lt. Gen. John L. DeWitt, reads as follows: [50]

"Copy

War Department
Washington

March 2, 1942

Lieutenant General John L. DeWitt,
Commander, Western Defense Command,
San Francisco, California.

Dear General DeWitt:

By letter dated February 20, 1942, I designated you as one of the appropriate Military Commanders to exercise the powers vested in me under Executive Order No. 9066, February 19, 1942, and I delegated to you such powers as are necessary to carry out the purposes of that Executive Order. Incident to the exercise of those powers, you are authorized to employ without regard to Civil Service or Classification laws or regulations, all persons or agencies necessary to carry out your duties. You are also authorized to employ the service of any association, firm, company, or corporation in furtherance of your mission. You will fix the rates of compensation so as to correspond as nearly as possible to the rates prevailing for similar service in the community in which the services are to be rendered.

Under the terms of Executive Order No. 9001, dated December 27, 1941, and subject to the limitations thereof and of the Act of December 18, 1941 (First War Powers Act, 1941, Public Law

354—77th Congress), I am expressly authorized to delegate further the powers therein delegated to me. Pursuant thereto, I delegate to you, within the limits of the amounts appropriated by the Congress, the power to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts.

In order to remove any doubt as to your authority to obligate funds, I specifically authorize you to obligate funds in such amounts as you deem necessary to effectuate the purposes of the Executive Order, and of your instructions, from any funds in an allotted status available to you, or to incur obligations in excess of such funds, reporting deficiencies to the appropriate chief of supply arm or service.

Sincerely yours,
(S) HENRY L. STIMSON
Secretary of War.

A True Copy:

The letter of February 20, 1942, referred to above, was Secret.

H. B. LEWIS
Colonel, A. G. D. Adjutant General." [51]

Government's Exhibit 4 which consists of a certified copy of Public Proclamation No. 1, Head-

quarters Western Defense Command and Fourth Army, March 2, 1942, and which, save and except as to the certificate which is not material to any question involved in this case, reads as follows:

"Whereas, By virtue of orders issued by the War Department on December 11, 1941, that portion of the United States lying within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona and the Territory of Alaska has been established as the Western Defense Command and designated as a Theatre of Operations under my command; and

Whereas, By Executive Order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any such designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion; and

Whereas, The Secretary of War on February 20, 1942, designated the undersigned as

the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command; and

Whereas, The Western Defense Command embraces the entire Pacific Coast of the United States which by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations:

Now Therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

1. The present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones thereof as defined in Exhibit 1, hereto attached, and as generally shown on the map attached hereto and marked Exhibit 2. [52]

2. Military Areas Nos. 1 and 2, as particu-

larly described and generally shown herein-after and in Exhibits 1 and 2 hereto, are hereby designated and established.

3. Within Military Areas Nos. 1 and 2 there are established Zone A-1, lying wholly within Military Area No. 1; Zones A-2 to A-99, inclusive, some of which are in Military Area No. 1, and the others in Military Area No. 2; and Zone B, comprising all that part of Military Area No. 1 not included within Zones A-1 to A-99, inclusive; all as more particularly described and defined and generally shown hereinafter and in Exhibits 1 and 2.

Military Area No. 2 comprises all that part of the States of Washington, Oregon, California and Arizona which is not included within Military Area No. 1, and is shown on the map (Exhibit 2) as an unshaded area.

4. Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from all of Military Area No. 1 and also from such of those zones herein described as Zones A-2 to A-99, inclusive, as are within Military Area No. 2.

Certain persons or classes of persons who are by subsequent proclamation excluded from the zones last above mentioned may be permitted, under certain regulations and restrictions to be hereafter prescribed, to enter upon or remain within Zone B.

The designation of Military Area No. 2 as

such does not contemplate any prohibition or regulation or restriction except with respect to the zones established therein.

5. Any Japanese, German or Italian alien, or any person of Japanese Ancestry now resident in Military Area No. 1 who changes his place of habitual residence is hereby required to obtain and execute a "Change of Residence Notice" at any United States Post Office within the States of Washington, Oregon, California and Arizona. Such notice must be executed at any such Post Office not more than five nor less than one day prior to any such change of residence. Nothing contained herein shall be construed to affect the existing regulations of the U. S. Attorney General which require aliens of enemy nationalities to obtain travel permits from U. S. Attorneys and to notify the Federal Bureau of Investigation and the Commissioner of Immigration of any change in permanent address.

6. The designation of prohibited and restricted areas within the Western Defense Command by the Attorney General of the United States under the Proclamations of December 7 and 8, 1941, and the instructions, rules and regulations prescribed by him with respect to such prohibited and restricted areas, are hereby adopted and continued in full force and effect. [53]

The duty and responsibility of the Federal

Bureau of Investigation with respect to the investigation of alleged acts of espionage and sabotage are not altered by this proclamation.

J. L. DeWITT,

Lieutenant General,
U. S. Army,
Commanding."

Exhibit 1 referred to in Government's Exhibit 5 contains a description of Military Area No. 1, and Exhibit 2 referred to in Government's Exhibit 4 is a map showing the territory described and from these Exhibits it is shown that the city of Portland is included in the area classified as "Prohibited Zone 'A-1'".

Government's Exhibit 5 which consists of a certified copy of Public Proclamation No. 3, Headquarters, Western Defense Command and Fourth Army, March 24, 1942, reads as follows:

"To: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally:

Whereas, By Public Proclamation No. 1, dated March 2, 1942, this headquarters, there were designated and established Military Areas Nos. 1 and 2 and Zones thereof, and

Whereas, By Public Proclamation No. 2, dated March 10, 1942, this headquarters, there were designated and established Military Areas Nos. 3, 4, 5 and 6 and Zones thereof, and

Whereas, The present situation within these Military Areas and Zones requires as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones thereof:

Now, Therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare and establish the following regulations covering the conduct to be observed by all alien Japanese, all alien Germans, and all alien Italians, and all persons of Japanese ancestry residing or being within the Military Areas above described, or such portions thereof as are hereinafter mentioned: [54]

1. From and after 6:00 A. M., March 27, 1942, all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1, or within any of the Zones established within Military Area No. 2, as those areas are defined and described in Public Proclamation No. 1, dated March 2, 1942, this headquarters, or within the geographical limits of the designated Zones established within Military Areas Nos. 3, 4, 5,

and 6, as those areas are defined and described in Public Proclamation No. 2, dated March 16, 1942, this headquarters, or within any of such additional Zones as may hereafter be similarly designated and defined, shall be within their place of residence between the hours of 8:00 P. M. and 6:00 A. M., which period is herein-after referred to as the hours of curfew.

2. At all other times all such persons shall be only at their place of residence or employment or traveling between those places or within a distance of not more than five miles from their place of residence.

3. Nothing in paragraph 2 shall be construed to prohibit any of the above specified persons from visiting the nearest United States Post Office, United States Employment Service Office, or office operated or maintained by the Wartime Civil Control Administration, for the purpose of transacting any business or the making of any arrangements reasonably necessary to accomplish evacuation; nor be construed to prohibit travel under duly issued change of residence notice and travel permit provided for in paragraph 5 of Public Proclamations Numbers 1 and 2. Travel performed in change of residence to a place outside the prohibited and restricted areas may be performed without regard to curfew hours.

4. Any person violating these regulations will be subject to immediate exclusion from the

Military Areas and Zones specified in paragraph 1 and to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled: "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zone." In the case of any alien enemy, such person will in addition be subject to immediate apprehension and internment.

5. By subsequent proclamation or order there will be prescribed those classes of persons who will be entitled to apply for exemptions from exclusion orders hereafter to be issued. Persons granted such exemption will likewise and at the same time also be exempted from the operation of the curfew regulations of this proclamation.

6. After March 31, 1942, no person of Japanese ancestry shall have in his possession or use or operate at any time or place within any of the Military Areas 1 to 6 inclusive, as established and defined in Public Proclamations Nos. 1 and 2, above mentioned any of the following items: [55]

- (a) Firearms.
- (b) Weapons or implements of war or component parts thereof.
- (c) Ammunition.
- (d) Bombs.

- (e) Explosives or the component parts thereof.
- (f) Short-wave radio receiving sets having a frequency of 1,750 kilocycles or greater or of 540 kilocycles or less.
- (g) Radio transmitting sets.
- (h) Signal devices.
- (i) Codes or ciphers.
- (j) Cameras.

Any such person found in possession of any of the above named items in violation of the foregoing will be subject to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled: "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zone."

7. The regulations herein prescribed with reference to the observance of curfew hours by enemy aliens, are substituted for and supersede the regulations of the United States Attorney General heretofore in force in certain limited areas. All curfew exemptions heretofore granted by the United States Attorneys are hereby revoked effective as of 6:00 a. m., PWT, March 27, 1942.

8. The Federal Bureau of Investigation is designated as the agency to enforce the foregoing provisions. It is requested that the civil police within the states affected by this Pro-

lamation assist the Federal Bureau of Investigation by reporting to it the names and addresses of all persons believed to have violated these regulations.

J. L. DeWITT
Lieutenant General,
U. S. Army
Commanding

A True Copy:

H. B. LEWIS
Colonel, A.G.D.
Adjutant General."

Government's Exhibit 6 which consists of a certified copy of Public Proclamation No. 5, Headquarters, Western Defense Command and Fourth Army, dated March 30, 1942, and which reads as follows:

To: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally:

Whereas, by Public Proclamation No. 1, dated March 2, 1942, this headquarters, there were designated and established Military Areas Nos. 1 and 2 and Zones thereof, and [56]

Whereas, by Public Proclamation No. 2, dated March 16, 1942, this headquarters, there were designated and established Military Areas Nos. 3, 4, 5 and 6 and Zones thereof, and

Whereas, the present situation within these

Military Areas and Zones requires as a matter of military necessity the establishment of certain regulations, as set forth hereinafter:

Now, Therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare and establish the following regulations covering the conduct to be observed by all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the Military Areas above described:

Prior to and during the period of exclusion and evacuation of certain persons or classes of persons from prescribed Military Areas and Zones, persons otherwise subject thereto but who come within one or more of the classes specified in (a), (b), (c), (d), (e) and (f), below, may make written application for exemption from such exclusion and evacuation. Application Form WDC-PM 5 has been prepared for that purpose and copies thereof may be procured from any United States Post Office or United States Employment Service office in the Western Defense Command by persons who deem themselves entitled to exemption.

The following classes of persons are hereby authorized to be exempted from exclusion and evacuation upon the furnishing of satisfactory proof as specified in Form WDC-PM 5:

- (a) German and Italian aliens seventy or more years of age.
- (b) In the case of German and Italian aliens, the parent, wife, husband, child of (or other person who resides in the household and whose support is wholly dependent upon) an officer, enlisted man or commissioned nurse on active duty in the Army of the United States (or any component thereof), U. S. Navy, U. S. Marine Corps, or U. S. Coast Guard.
- (c) In the case of German and Italian aliens, the parent, wife, husband, child of (or other person who resides in the household and whose support is wholly dependent upon) an officer, enlisted man or commissioned nurse who on or since December 7, 1941, died in line of duty with the armed services of the United States indicated in the preceding subparagraph.
- (d) German and Italian aliens awaiting naturalization who had filed a petition for naturalization and who had paid the filing fee therefor in a court of competent jurisdiction on or before December 7, 1941. [57]
- (e) Patients in hospital, or confined elsewhere, and too ill or incapacitated to be removed therefrom without danger to life.

(f) Inmates of orphanages and the totally deaf, dumb or blind.

The applicant for exemption will be required to furnish the kinds of proof specified in Form WDC-PM 5 in support of the application. The certificate of exemption from evacuation will also include exemption from compliance with curfew regulations, subject, however, to such future proclamations or orders in the premises as may from time to time be issued by this headquarters. The person to whom such exemption from evacuation and curfew has been granted shall thereafter be entitled to reside in any portion of any prohibited area, including those areas heretofore declared prohibited by the Attorney General of the United States.

J. L. DeWITT

Lieutenant General,
U. S. Army
Commanding

A True Copy:

H. B. LEWIS
Colonel, A.G.D.
Adjutant General."

Government's Exhibit 7 which is the original birth certificate of Minoru Yasui, the defendant in this case, filed in the Vital Statistics Division of the Oregon State Board of Health, and which reads as follows:

154

"Oregon State Board of Health
Division of Vital Statistics

CERTIFICATE OF BIRTH
Register No. 159

Place of Birth

County of

of

City of Hood River. (No. Third Street; Ward)

Full Name of Child—Minoru Yasui.

If child is not named, make supplemental report.

Sex of Child—Male.

Twin, 1. Triplet, or other. Number and in order
3 of birth. (To be answered only in event of plural
births.)

Legitimate? Yes.

Date of Birth—Oct. 19, 1916.

Father:

Full Name—Masuc Yasui.

Residence—Hood River, Ore.

Age at Last Birthday—29.

Color or Race—Japanese.

Birthplace—Japan.

Occupation—General Merchant.

Number of children born to this mother, in-
cluding present birth—3.

Mother:

Full Maiden Name—Shidzu Miyake.

Residence—Hood River, Ore.

Age at Last Birthday—27.

Color or Race—Japanese.

Birthplace—Japan.

Occupation—Housewife.

**Number of children of this mother, now living,
including present birth—3.**

**Were precautions taken against ophthalmia neo-
natorum?—Yes. [58]**

**CERTIFICATE OF ATTENDING PHYSICIAN
OR MIDWIFE***

I hereby certify that I attended the birth of this child, who was born alive at 5:30 P. M. on the date above stated.

(Signature)

H. L. DUMBLE, M. D.

Physician

Address

Hood River, Oregon.

Oct. 31, 1916.

J. EDGINGTON,

Registrar.

Given name added from a supplemental report
Nov. 10, 1916.

A. L. McBRIDE

Asst. State Registrar

N.B.—In case of more than one child at birth, a

*When there was no attending physician or mid-wife, then the father, householder, etc., should make this return. A stillborn child is one that neither breathes nor shows other evidence of life after birth.

Separate Return must be made for each, and the number of each, in order of birth, stated. This certificate must be filed by the attending Physician or Midwife with the Local Registrar within 10 days after birth."

Government's Exhibit 8 which consists of a certified copy of General Orders No. 1, Headquarters, Western Defense Command and Fourth Army, dated December 11, 1941, and which reads as follows:

**"General Orders
Number 1**

1. The following War Department radiogram, December 11, 1941, is quoted for the information and guidance of all concerned:

"The activation of the Western Defense Command including Alaska, is hereby confirmed. It is designated as a theater of operations. The Fourth Army, Second Air Force, Fourth Air Force and Ninth Corps Area, including attached units are assigned to this command. Lieutenant General John L. DeWitt is designated as Commander."

2. Pursuant to the authority contained in the radiogram quoted above, the undersigned assumes command of the Western Defense Com-

mand and retains command of the Fourth Army.

J. L. DeWITT

Lieutenant General,
U. S. Army,
Commanding.

(Stamp) (Headquarters Western Defense
Command and Official Copy Fourth Army)

Distribution: "A", "B", "G" & "J".

Ninth Corps Area 1000

Second Air Force 500

Fourth Air Force 500

11th Naval Dist. 10

12th Naval Dist. 10

13th Naval Dist. 10

A True Copy:

H. B. LEWIS

Colonel, A.G.D.

Adjutant General." [59]

Government's Exhibit 9 which consists of a certified copy of a telegram dated December 11, 1941, addressed to Commanding General, Fourth Army, and signed "Marshall", and which reads as follows:

Washington DC
Dec 11, 1941,
621 PM

"Priority
Commanding General
Fourth Army
Pres of SF, Calif

The activation of the Western Defense Command including Alaska, is hereby confirmed. It is designated as a theatre of operations. The Fourth Army, Second Air Force, Fourth Air Force and Ninth Corps Area, including attached units are assigned to this command. Lieutenant General John L. DeWitt is designated as commander.

MARSHALL

(Stamp) (Headquarters Western Defense Command and Official Copy Fourth Army)

A True Copy:

H. B. LEWIS

Colonel, A.G.D.
Adjutant General."

Defendant's Exhibit 1 which consists of a registration card with the Department of State for Minoru Yasui, the defendant, and which reads as follows:

"Department of State
Washington
Minoru Yasui
has notified the Secretary of State of his (or

her) status in the United States as an official (or employee) of the Japanese Government.

(Sgd) G. T. SUMMERLIN
GEORGE T. SUMMERLIN,
Chief,
Division of Protocol.

Date June 21, 1941.

The Secretary of State must be notified of any change in the status of the holder of this receipt."

Defendant's Exhibit 10 which consists of a Stipulation entered into between the plaintiff and the defendant and which reads as follows: [60]

"In the District Court of the United States
For the District of Oregon

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MINORU YASUI,

Defendant.

STIPULATION

It is hereby stipulated by the parties to the above entitled action that at the trial of the action the following facts are admitted to be true and proof thereof is waived, to-wit:

During and prior to the year 1916 and at the time of the birth of the defendant, Minoru Yasui, the father of the defendant, Masuo

Yasui, and Shidzu Yasui, his wife, the mother of the defendant were residents and inhabitants of Hood River, Oregon; that during all of said time, the defendant's father hereinbefore named was engaged in business in Hood River, Oregon, as a merchant, and that during all of said times, the defendant's mother hereinbefore named was a housewife, and that neither of the defendant's said parents were in the diplomatic service of any country.

CHARLES S. BURDELL

Of attorneys of the
United States of America

E. F. BERNARD

Attorney for the Defendant."

Defendant's Exhibit 11 which consists of a telegram addressed to Minoru Yasui and signed M. Yasui, and which reads as follows:

"Western Union

PRA592 27 NT—K1 Hoodriver Org 7

Minoru Yasui—

306 Dearborn Plaza

1032 North Dearborn St. Chgo—

As war has started your country needs your service as a United States reserve officer I as your father strongly urge you to respond to the call immediately—

M. YASUI."

Defendant's Exhibit 12 which is a letter dated December 8, 1941, addressed to 2nd Lt. Minoru Yasui, and signed E. P. Curtis, and which reads as follows: [61]

"Headquarters Second Military Area
225 U. S. Court House
Portland, Oregon

EPC/f

December 8, 1941

201-Yasui, Minoru

2nd Lt., Inf-Res.

Subject: Extended Active Duty

To: 2nd Lt. Minoru Yasui, Inf-Res.

1032 N. Dearborn Street

Chicago, Illinois

1. Receipt of your telegram of December 8, 1941, is acknowledged. Your tender of service is appreciated and has been made of record at this headquarters.

2. No change in the present War Department policy of ordering officers to active duty to fill existing vacancies has been made. When your name is reached on our priority list for active duty, you will be contacted by this headquarters. In the meantime, it is suggested that you hold yourself in readiness for an early call to active duty.

By command of Major General Benedict:

E. P. CURTIS

Major, A.G.D.

Asst. Adj. Gen."

Defendant's Exhibit 13 which is a telegram dated December 11, 1941, addressed to 2nd Lt. M. Yasui, and signed E. P. Curtis, Asst. Adj. Gen., and which reads as follows:

"Western Union

CAV335 17 Collect—
Portland, Org 11 443P
2nd Lt M Yasui—
Inf Res 1032 North Dearborn St—

Reurtel effective date or details regarding your active duty not yet determined stop await further instructions—

E. P. CURTIS
Asst. Adj. Gen."

Defendant's Exhibit 14 which is a letter dated March 28, 1942, addressed to 2nd Lt. Minoru Yasui, and signed W. R. Martin, and which reads as follows: [62]

"Headquarters Second Military Area

225 U. S. Court House

Portland, Oregon

hja/vjm.

March 28, 1942.

201-Yasui, Minoru,
2nd Lt., Inf-Res.

Subject: Status.

To: 2nd Lt. Minoru Yasui, Inf-Res.

704 12th Street,
Hood River, Ore.

The following War Department letter, file

and subject as above, dated March 19, 1942, forwarded by 1st indorsement, Hq. Ninth Corps Area, dated March 23, 1942, is quoted for your information and guidance:

1. Reference is made to your first wrapper indorsement of February 25, 1942, forwarding report of physical examination dated January 19, 1942, of Second Lieutenant Minoru Yasui, Infantry Reserve, (0-360897). The physical defect, defective vision, 8-200 right, is noted.
2. Waiver of the above noted defect is authorized for limited service under the provisions of letter, this office dated January 7, 1942, file AG 210.31 (12-19-41) RP-A, subject: "Waiving of physical defects for limited service officers of the supply arms and services."
3. Lieutenant Yasui will be retained in the Infantry Reserve with eligibility for limited service only.

By command of Major General Benedict:

W. R. MARTIN,

Captain, A.G.D.

Asst. Adj. Gen."

No Exhibits were received in evidence or offered at the trial other than as in this Bill of Exceptions set forth.

During the trial of the case and while the defendant was testifying as a witness in his own behalf the following proceedings were had:

Q. The record introduced by the Government shows that your birth was on October 19, 1916, at Hood River, Oregon. Does that conform with your information that that is the date of your birth? A. It does, sir. [63]

Mr. Bernard: I would like to have this marked for identification, please.

(Stipulation entitled in the above entitled cause, between Charles S. Burdell, of attorneys of the United States of America, and E. F. Bernard, Attorney for the Defendant, was thereupon marked for identification as Defendant's Exhibit 10.)

Mr. Burdell: Oh, I have no objection.

The Court: Admitted.

(Said stipulation, so offered and received, having previously been marked for identification, was thereupon marked received as Defendant's Exhibit 10.)

Mr. Bernard: I would like to say, your Honor, this is a stipulation entered into by the Government and myself whereby certain facts are admitted in the case.

The stipulation referred to was then read to the court and thereupon the following proceedings were had:

Mr. Burdell: May it be understood, your Honor, that that stipulation is only for the purpose of this case?

The Court: I don't know exactly what that means. Either it is a fact or it isn't a fact. In other words, this Court refuses to try some moot question that is set up by the attorneys for the defense and the Government.

Mr. Burdell: All right, it may be stipulated as a fact, your Honor.

The Court: Stipulation received in evidence.

[64]

At the conclusion of all the evidence in the case and after both parties had rested, the defendant interposed a motion for a directed verdict and for a verdict and judgment of not guilty and the following proceedings were had:

Mr. Bernard: At this time, your Honor, the defendant wishes to interpose a motion for a mandatory verdict or judgment of not guilty in this case, on the ground, first, that the indictment fails to state a charge, inasmuch as it is alleged in the indictment that the defendant was born at Hood River, Oregon, in 1916, and there is a presumption from the fact of birth that citizenship follows.

Second, that the evidence is conclusive and without dispute that defendant since his birth, and particularly at the time alleged in the indictment that these acts were committed, had been and is a citizen of the United States, and as such these regulations are void as to him, for the reason that they deprive him of his

liberty and his property without due process of law.

The Court: * * * I would suggest that inasmuch as the question is pretty involved you had better include the other grounds of your motion, and that is that it deprives him of equal protection of the law. That is the other phase of it.

Mr. Bernard: * * * I will add to the motion that, in addition to the ground that the regulations violate the due process of law provisions of the Fifth Amendment, the regulation is discriminatory in that it applies to Japanese-American citizens, or citizens of Japanese ancestry, and to no other citizens, and does not apply [65] to citizens of Italian ancestry or citizens of German ancestry; and that the regulations is discriminatory and deprives the defendant of the equal protection of the laws which he is entitled to enjoy as an American citizen.

After argument of counsel the court took the motion of the defendant under consideration and thereafter, to-wit, on the 16th day of November, 1942, the court rendered its decision and found, as a matter of law, that the regulations which the defendant was charged with violating were void as to citizens of the United States of America and the court made a finding that the defendant was not a citizen of the United States and that the de-

fendant was a citizen of Japan, and the court denied the foregoing motion of the defendant and adjudged the defendant to be guilty.

The defendant duly saved an exception to the finding of the court that the defendant was not a citizen of the United States and was a citizen of Japan, and to the failure of the court to not hold that the defendant was a citizen of the United States, and the exceptions were allowed by the court. The defendant duly saved an exception to the order of the court denying the defendant's foregoing motion for a verdict and judgment and the exception was allowed by the court. The defendant objected and saved an exception to the imposing of any sentence against the defendant and the exception was allowed by the court.

It Is Hereby Certified that the foregoing proceedings were had upon the trial of this cause and that this Bill of Exceptions, which includes a transcript of all the testimony received upon the trial of this cause, which testimony is hereunto attached and marked Exhibit X, contains all the evidence offered or admitted, relative to, or necessary to, an understanding of the foregoing objections and exceptions, together with copies of all exhibits and evidence received or offered upon the trial of this cause and all proceedings had at the trial. [66]

It is further Certified that the foregoing exceptions in each case asked or taken by the defendant were allowed by the court and that this Bill of Exceptions has been presented, settled, and filed

within the time fixed by law and is, by me, duly allowed and signed this 5th day of January, 1943.

JAMES ALGER FEE

One of the Judges of the District Court of the United States for the District of Oregon. [67]

State of Oregon

County of Multnomah—ss.

Due service of the within Bill of Exceptions is hereby accepted in Multnomah County, Oregon, this 15 day of December, 1942, by receiving a copy thereof duly certified as such by E. F. Bernard, of Attorneys for the Defendant.

CARL C. DONAUGH,

Of Attorneys for Defendant.

[Endorsed]: Lodged in Clerk's Office Dec. 15, 1942. G. H. Marsh, Clerk. By R. D. W. Mott, Dep.

[Endorsed]: Filed Jan. 5, 1943. [68]

EXHIBIT X

In the District Court of the United States
for the District of Oregon

C-16056

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MINORU YASUI,

Defendant.

TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS

Portland, Oregon, Friday, June 12, 1942.
10:05 o'clock A.M.

Before: Honorable James Alger Fee, Judge.

Appearances:

Messrs. Carl C. Donaugh, United States Attorney, J. Mason Dillard, Assistant United States Attorney, and Charles S. Burdell, Special Assistant to the Attorney General, Attorneys for the United States of America, Plaintiff;

Mr. Earl F. Bernard, Attorney for Defendant.

Amicus Curiae:

Messrs. Green & Landye (By Mr. B. A. Green and Mr. Will Roberts);

Messrs. Dey Hampson & Nelson (By Messrs. R. R. Morris and Jack M. McLaughlin);

Exhibit X—(Continued)

Messrs. Hart, Spencer, McCulloch & Rockwood (By Messrs. Omar C. Spencer and Manley B. Strayer);
Messrs. Maguire, Shield, Morrison & Biggs [1*] (By Mr. Randall Kester);
Mr. Gus J. Solomon.

Cloyd D. Raueh, Court Reporter.

Proceedings:

The Court: United States of America, plaintiff, versus Minoru Yasui, defendant.

Mr. Bernard: The defendant is ready for trial, your Honor.

Mr. Donaugh: The Government is ready, your Honor.

The Court: The reporter will note the presence of the attorneys whom the Court has asked to appear as friends of the Court in this proceeding on the constitutional questions. Gentlemen, will you introduce yourselves for the purpose of putting your names in the record?

Mr. Solomon: Gus J. Solomon.

Mr. Green: B. A. Green, and also appearing here in court with me is Will Roberts, and it is my intention, your Honor, not to remain during the entire session, but Mr. Roberts will be here during the entire session.

* Page numbering appearing at top of page of original Reporter's Transcript.

Exhibit X—(Continued)

The Court: Yes.

Mr. Kester: Randall B. Kester, for the firm of Maguire, Shields, Morrison & Biggs.

Mr. Strayer: Manley Strayer and Omar C. Spencer, of the firm of Hart, Spencer, McCulloch & Rockwood. [2]

Mr. Morris: Jack McLaughlin and R. R. Morris, of the firm of Dey, Hampson & Nelson.

The Court: Thank you, gentlemen.

You may proceed.

Mr. Donaugh: May it please your Honor, I take it from the manner in which this case has been called that the case will be tried by your Honor in the absence of a jury?

The Court: Yes, I understand the record has been made and I think there is a formal waiver of record. Or has there been?

Mr. Bernard: I doubt very much if there has been. My recollection is that it has not, but at this time we will stipulate and request that the case be tried by the Court without a jury.

The Court: And will the defendant make that request personally?

The Defendant: Yes, your Honor.

The Court: The defendant has requested that the case be tried by the Court without a jury, and the Court accedes to the request to try the case without a jury.

Mr. Donaugh: Yes, your Honor. I may state briefly to your Honor that this case is a case orig-

Exhibit X—(Continued)

inating by reason of the formal indictment of the Grand Jury for Multnomah County charging the defendant Minoru Yasui with having failed to comply with what is known as Public Proclamation No. 3 issued by the Western Defense Command and Fourth Army, through Lieutenant General J. L. DeWitt, the Commanding Officer of the Western Defense Command and Fourth Army, and what is known as Public [3] Law No. 503, passed by the 77th Congress and approved on March 21, 1942, wherein the Government, by evidence to be presented before your Honor, charges that the defendant, a Japanese, by reason of being a person of Japanese ancestry coming within the purview of the proclamation issued by the Western Defense Command, was absent from his place of residence on and about March 28, 1942, by failing to comply with the orders of the Western Defense Command requiring that all persons of Japanese ancestry be at their places of residence from 8:00 o'clock P.M. up until and including 6:00 o'clock A.M. on the following day.

The facts in this case, as will be presented by witnesses before your Honor, are to the effect that he appeared here in Portland after the 8:00 o'clock hour and was taken into custody by the Portland Police Department, he walking into the Police Station, as I recall the facts, at or about 11:30 or 11:45 P.M., or thereabouts, and was taken into custody by the Portland Police Department under the

Exhibit X—(Continued)

proclamation of the military authorities issued in a military district and establishing the curfew hour.

That, in brief, your Honor, is the nature of the offense charged, and the evidence to be introduced here will be through the testimony of the police officers and the investigation of the case by the agents of the Government.

The Government is also prepared to introduce other testimony concerning the defendant, and if, as and when the opportunity presents under the rules of evidence has the [4] information as to certain beliefs which may be shared by persons of Japanese ancestry, should such evidence be pertinent to the case in hand.

The facts, however, are on the basis of absence from home between the hours of 8:00 o'clock P.M. and 6:00 o'clock A.M.

Mr. Bernard: If your Honor pleases, I know from the fact that your Honor has requested certain attorneys in Portland to appear in this case amici curiae that the case must have been considered a little by your Honor already, and for that reason I am not going to make an extended statement.

The evidence in this case will show that Mr. Yasui is an American citizen, and we will introduce evidence to show that that citizenship he has never been divested of, and that at the time of the alleged commission of the acts charged in this indictment he was an American citizen and entitled to all the

Exhibit X—(Continued)

privileges and immunities that attach to that status.

It will be our contention that this proclamation as applied to this defendant, and, indeed, the Executive Order of the President, if that Executive Order ever contemplated granting such power to the military commander, are void as a violation of the constitutional rights that attach to citizenship, and in that connection it will be our further contention that the war power of the Government of the United States does not diminish constitutional guaranties, particularly the guaranties attaching to citizenship under the fourth, fifth and sixth amendments [5] to the Constitution of the United States.

The Court: Proceed.

Mr. Donaugh: We will call Sergeant W. H. Mass.

WILLIAM H. MAAS

was thereupon produced as a witness in behalf of the United States of America, plaintiff herein, and was examined and testified as follows:

The Clerk: State your name, please.

A. William H. Maas.

The Clerk: Spell the last name.

A. (Spelling) M-a-a-s.

(The witness was thereupon duly sworn.)

Exhibit X—(Continued)
(Testimony of William H. Maas.)

Direct Examination

By Mr. Donaugh:

Q. Your name is W. H. Maas?

A. That is right.

Q. And you are a Sergeant with the Portland Police Department? A. Yes, sir.

Q. Were you a Sergeant of the Portland Police Department on and about May 28th and May 29th, 1942? A. That isn't the date.

Q. You say you were?

A. You haven't got the date right there. [6]

Q. I say, were you a Sergeant of the Portland Police Department? A. Yes, sir.

Q. On or about March 29th, or March 28th, 1942? A. Yes, sir.

Q. Did you at any time have occasion to see Minoru Yasui, the defendant in this case?

A. Yes, sir.

Q. And interview him, at that time?

A. Yes, sir.

Q. Whereabouts did you see him?

A. He came into the Police Station.

Q. On what date? A. March 28th.

Q. March 28th? A. At 11:20.

Q. At what time?

A. Eleven-twenty P.M.

Q. Eleven-twenty P.M.? A. Yes, sir.

Q. And what took place when he came into the Police Station?

Exhibit X—(Continued)

(Testimony of William H. Maas.)

A. Why, he came in there and he told me that he wanted to be arrested, he wanted to test the constitutionality of that alien curfew law. He said he had been down in the North End; he asked several policemen down there to arrest him, but they [7] wouldn't do it, and so he came into the Station.

Q. Did you have any further conversation with him?

A. Well, he told me that he was an American citizen, lived at Hood River, and that he wanted to test this case for the Japanese.

Q. Was that the substance and the total of your conversation with him at that time?

A. That was about all, yes.

Q. And he was placed under arrest, was he?

A. Yes, sir.

Q. Have you had occasion at any time to talk to him again? A. No.

Q. Were other officers present with you when he came into the Station, or were you just there alone at that time?

A. I was there alone.

Mr. Donaugh: That is all, Sergeant.

Mr. Bernard: No cross-examination.

(Witness excused.)

— . . . —

Mr. Donaugh: We will call Mr. Quinn. [8]

Exhibit X—(Continued)

VINCENT M. QUINN

was thereupon produced as a witness in behalf of the United States of America, plaintiff herein, and was examined and testified as follows:

The Clerk: State your name, please.

A. Vincent M. Quinn.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Donaugh:

Q. Just state your name, Mr. Quinn, full name.

A. Vincent A. Quinn.

Q. And what is your business or occupation?

A. Special Agent of the Federal Bureau of Investigation, assigned to the Portland Field Office.

Q. And when were you assigned to the Portland Field Office, about when?

A. Around October 1st, 1941.

Q. And are you now so assigned?

A. I am.

Q. Have been since your assignment?

A. Yes, I have.

Q. Have you had occasion, in connection with your official duties, to talk with, interview or contact the defendant, Minoru Yasui?

A. Yes, I have.

Q. Will you state when you did that? [9]

A. On January 12, 1942 Mr. Yasui visited our office, at which time he advised that he was return-

Exhibit X—(Continued)

(Testimony of Vincent M. Quinn.)

ing from Chicago, Illinois, where he had been employed by the Japanese Consulate. He stated that he was doing general secretarial work for the Consulate and that he resided at Hood River, Oregon. At that time he exhibited to me a card verifying the fact that he was registered with the Department of State as an agent for a foreign principal. The card was dated June 21, 1941. Mr. Yasui told me that he resigned—or, rather, withdrew his registration as an agent for a foreign principal on December 8th. He also advised—rather, he exhibited to me a certified copy of birth certificate which he had in his possession which had been issued by the Oregon Department of Health. This certificate stated that Mr. Yasui was born in Hood River, Oregon on October 11, 1916. His father's name was stated to be Masuo Yasui. Mr. Yasui also advised me that he was a Second Lieutenant in the United States Army and that he expected to report for a physical examination around January 19, 1942, at which time he thought he would be inducted into the active forces of the United States.

That, in substance, was the conversation I had on January 12th, 1942.

On April 3rd, 1942 I visited at the Portland Police Department, after our office had been advised that Mr. Yasui had surrendered himself, wishing to test the constitutionality of the curfew regulations, and I verified the record of the [10] Port-

Exhibit X—(Continued)

(Testimony of Vincent M. Quinn.)

land Police Department, which set forth: that on March 28, at approximately 11:50 P.M., Mr. Yasui appeared and surrendered himself, at which time he stated that he desired to test the constitutionality of the curfew regulations.

Q. In connection with your conversation and reference by the defendant to his parents, as you have previously testified, did he make any statement as to the nationality of his parents?

A. Yes, he did. He told me they were Japanese aliens. It was also disclosed on the certified copy of his birth certificate that both of the parents were born in Japan.

Q. Do you know how long the family or the parents of the defendant have lived at Hood River? Was that discussed at any time?

A. That was not discussed at the time, although Mr. Yasui told me that his father at that time was not at Hood River.

Q. Was any information given you concerning the subject's—or defendant's education, as to where he attended school in this country, or when?

A. Yes, he stated that he had graduated from the University of Oregon. I don't recall the dates or the year he graduated, although he probably did tell me. He stated that he had been admitted to practice before the local courts and that he was an attorney at law.

Exhibit X—(Continued)

(Testimony of Vincent M. Quinn.)

Q. Do you know how long he was employed by the Japanese Consul General in Chicago?

A. I believe he told me that he registered with the Secretary of [11] State at the time he commenced his employment, and the card was dated June 21, 1941, as I recall.

Q. Now, you mentioned that he withdrew from such employment on, did you say, December 9th?

A. December 8th.

Q. December 8th.

A. The day after the declaration of war with Japan.

Q. When you refer to December 8th, you mean December 8th of what year? A. 1941.

Q. You testified a moment ago in regard to the defendant holding a commission in the United States Army. Do you know how he acquired that commission, or when?

A. He advised me that he acquired the commission by taking a reserve officers' training course while attending the University of Oregon, R.O.T.C. course.

Q. And he still held that commission at the time you talked with him?

A. He stated that he did.

Q. And when did he see you?

A. January 12th of this year.

Q. January 12th of this year, 1942?

A. That is right.

Mr. Donaugh: That is all, Mr. Quinn. [12]

Exhibit X—(Continued)
(Testimony of Vincent M. Quinn.)

Cross Examination

By Mr. Bernard:

Q. Just a moment; I want to ask you a question or two, Mr. Quinn. Your first contact with this man was on January 12th, was it?

A. That is right.

Q. And did he come to your office voluntarily, or had you sent for him?

A. He came to the office voluntarily.

Q. And did he state what the purpose of his call was? A. He did.

Q. What was it?

A. He stated that he came to the office to inquire as to whether or not he could assist his father in any way. His father at the time was in Federal custody. He had been apprehended as an alien enemy.

Q. Well, you mean he had been taken into custody up at Hood River as an alien enemy?

A. That is right.

Q. You don't mean by "apprehended" that he had been in hiding any place, do you?

A. No, I don't.

Q. And then after discussing that matter how did you get onto the discussion of Mr. Minoru Yasui himself?

A. Minoru Yasui volunteered the information given to me. [13]

Exhibit X—(Continued)

(Testimony of Vincent M. Quinn.)

Q. And he told you that he had been employed in the Japanese Consul's office at Chicago?

A. That is right.

Q. Did he tell you in what capacity he had been employed?

A. He stated that he was doing general secretarial work and acting somewhat as a clerk.

Q. Do you know whether or not American people were likewise employed in that office?

A. I do not know that.

Q. You have made no investigation?

A. I have not.

Q. And did he voluntarily exhibit this card to you? A. He did.

Q. And what was on that card?

A. It was a card issued by the United States Secretary of State, which set forth that he had registered on June 21, 1941, as an agent for a foreign principal.

Q. Do you know whether all employees in foreign consuls' offices have to be similarly registered?

A. I understand they are supposed to be registered.

Q. All employees?

A. That is right, if they are an agent for a foreign principal.

Mr. Bernard: Well, let's see,—will you hand this to the witness, please. And mark it, please.

Exhibit X—(Continued)
(Testimony of Vincent M. Quinn.)

(The card referred to, so produced, was thereupon [14] marked for identification as Defendant's Exhibit 1.)

Mr. Bernard: Q. Will you please examine Defendant's Exhibit 1 for identification and tell me if that is the card that the defendant exhibited to you on the occasion to which you have referred?

A. That is the card.

Mr. Bernard: We will offer the card in evidence, your Honor.

The Court: Admission is refused at the present time. You may introduce it in your case in chief.

Mr. Bernard: All right.

Q. Did he tell you when he had resigned this position in Chicago?

A. Yes, he did. He stated that he had notified the Secretary of State on December 8th, 1942. He stated that his father requested him to do so.

Q. Well, did he tell you that he had resigned his position on that date?

A. Yes, he did.

Q. And did you cause any check to be made at the office of the Secretary of State to find out if he had in fact notified the Secretary of State on that date that he had resigned his position?

A. No, I did not.

Q. Did he tell you that he had immediately on December 8th wired the military authorities offering his services in the [15] Army of the United States?

Exhibit X—(Continued)

(Testimony of Vincent M. Quinn.)

A. I don't recall that he told me that, although I do recall him stating that he expected to be called for a physical examination, to be inducted in the armed forces, around January 19th, the following week.

Mr. Bernard: I think that is all, Mr. Quinn.

(Witness excused.)

Mr. Donaugh: Call Mr. Mize.

RAY MIZE

was thereupon produced as a witness in behalf of the United States of America, plaintiff herein, and was examined and testified as follows:

The Clerk: State your name, please.

A. Ray Mize.

The Clerk: (Spelling) M-i-z-e?

A. Yes.

(The witness was thereupon duly sworn.)

Mr. Bernard: My attention has just been called to the fact, your Honor, that I think the last witness misspoke himself; he referred to December, 1942. I am assuming he meant 1941.

Mr. Donaugh: I had understood him to say 1941, but if there is any doubt about it I would like to recall him.

Exhibit X—(Continued)
(Testimony of Ray Mize.)

The Court: All right, recall him at this time. [16]

Mr. Donaugh: Yes, recall Mr. Quinn.
(Witness excused.)

VINCENT M. QUINN

was thereupon recalled as a witness in behalf of the United States of America, plaintiff herein, and was examined and testified further as follows:

Redirect Examination

By Mr. Donaugh:

Q. You testified, Mr. Quinn, in regard to a certain date, I believe, December 8.

A. That is right.

Q. What year did you refer to in that connection? A. 1941.

Mr. Bernard: That is all right.

Mr. Donaugh: Q. And you saw the defendant when?

A. I saw the defendant personally on January 12, 1942.

Mr. Donaugh: Yes. That is all.

Mr. Bernard: That is all, Mr. Quinn.
(Witness excused.) [17]

Exhibit X—(Continued)

RAY MIZE

thereupon resumed the stand as a witness in behalf of the United States of America, plaintiff herein, and, having previously been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Donaugh:

Q. Will you state your name, please.

A. Ray Mize.

Q. And what is your business or profession, Mr. Mize?

A. Special Agent of the Federal Bureau of Investigation, Portland Field Division.

Q. And how long have you been assigned to the Portland Field Division?

A. Approximately three months.

Q. And you have been assigned to this Division since three months ago, continuously since three months ago? A. I have, sir.

Q. Have you had occasion to make an investigation or to interview or contact the defendant, Minoru Yasui?

A. I had occasion to interview the defendant.

Q. When was that, Mr. Mize?

A. On March 30, 1942.

Q. And at what place and where?

A. In the office of the Federal Bureau of Investigation.

Q. Here in Portland? [18]

Exhibit X—(Continued)

(Testimony of Ray Mize.)

A. Yes, sir.

Q. Will you state the occasion for talking to him at that time?

A. Yes; at my request, Mr. Yasui called at the office for the purpose of being questioned as to violation of the curfew regulation. He voluntarily appeared and I discussed the same with him for approximately an hour on the evening of that date.

Q. Just what was the nature of your interview with him? What was said?

A. Mr. Yasui discussed with me a little bit of his background history, which indicated that he had attempted—had lived in Hood River, Oregon, had attended high school there, and had also attended the University of Oregon, where he had graduated from the Law School in 1939. Subsequent to that time he had practiced law for a brief period in Hood River and in Portland, after which time and during the first part of 1940 he had accepted a position, secretarial or clerical, with the Japanese Consulate in Chicago, Illinois.

Q. You say he started to work there when?

A. The first part of 1940. I don't recall the exact month, although he gave it to me. And he stated that he had resigned that position at the time the Pearl Harbor incident occurred. I asked him the reasons for his resignation at that time, and he indicated that he did not feel that he could be a loyal American citizen and at the same time be

Exhibit X—(Continued)

(Testimony of Ray Mize.)

employed as an agent for the Japanese government. He advised, also, that he held [19] a commission in the Reserve Officers Training Corps, which he had received on his graduation from the University of Oregon in Eugene. I discussed with him the violation of the curfew regulation, and he stated that he had given himself up voluntarily at the local Police Department here for the purpose of testing the constitutionality of the regulation itself. I asked him the reason for doing that, and he stated that he was an American citizen of Japanese descent and that he felt that a regulation such as the one that was being imposed was unconstitutional, in that it was a discrimination against one group of United States citizens and the same regulation did not apply to all citizens, and he felt that the large majority of the Japanese citizens in this country were loyal to this country and wanted to do their part in the present war and that they could not do their part in the present war under the restriction which was being discussed at that time. I discussed with him briefly the war itself and asked him whether he felt that the Japanese government had acted fair and square in the present war, and he said frankly that he did not think that the Japanese government had, and as a result American citizens of Japanese descent in this country were being called upon to be unjustly discriminated against and suffer for the crimes of another, and under the

Exhibit X—(Continued)**(Testimony of Ray Mize.)**

United States Constitution no person should suffer for the crimes of another one, indicating that the Japanese government had been the criminal and American citizens of Japanese descent [20] in this country were being subjected to unjust treatment as a result of that. I asked him if he felt that during these particular times his action would reflect very favorably on the Japanese colony, and Mr. Yasui stated that when thinking it over he did not think that it would be a very good reflection and that he in a certain sense was sorry that he had taken the action that he had.

Q. That was the substance of your interview with him at that time?

A. That is the substance of the interview, Mr. Donaugh, at that time.

Q. Did you have occasion to see him at any later period at all? A. I did not.

Q. You were not present when he called at the office of the FBI at some previous time?

A. I was not assigned to this office at that time and was not present.

Mr. Donaugh: May it please your Honor, at this time I should like to submit this document to be marked as Government's Exhibit Number 2 for identification.

(Certified copy of Foreign Official Status Notification, so produced, was thereupon marked for identification as Government's Exhibit 2.)

Exhibit X—(Continued)

(Testimony of Ray Mize.)

The Court: The witness suggests, Mr. Donaugh, that he did not complete his answer, apparently that he had forgotten something.

Mr. Donaugh: Oh, I see. [21]

A. In addition, with the Court's permission and counsel's permission, I have another point that I would like to bring up. I asked Mr. Yasui what he would do if he was in charge, in command of the West Coast here, and an invasion of this country was very probable, and I asked him what he would do to be very sure that the internal security of this country would be absolutely protected, and Mr. Yasui said, "Well, that is a rather hard question at this time", but after due hesitation he finally stated that "I feel I would intern all Japanese aliens and Japanese citizens." That is all.

Mr. Bernard: I have no objection to the document.

The Court: Admitted.

Mr. Donaugh: I should like to offer this in evidence, your Honor.

(The document referred to, having previously been marked for identification, was thereupon marked received as Government's Exhibit 2.)

Mr. Donaugh: May it please your Honor, reading from Government's Exhibit Number 2, a certificate from the Secretary of State, Washington, D. C., dated June 17, 1941, shows that the defend-

Exhibit X—(Continued)

(Testimony of Ray Mize.)

ant Minoru Yasui registered as an employee of the Consulate General of Japan at Chicago, Illinois, in the capacity of secretary.

"Date of assumption of present duties, April 1, 1940."

Performance—or, rather, the defendant's present and [22] proposed activities, including place or places of performance: "Secretarial work, and research; to be performed for the Consulate General of Japan, at Chicago, Illinois."

"Nature and place or places of occupation or employment during the last five years" is set forth as "September, 1933 to June, 1939, student, at University of Oregon, Eugene, Oregon. June, 1939 to November, 1939, ranch hand, Hood River, Oregon. November, 1939 to April, 1940, practice of law, Portland, Oregon. April, 1940 to present date, secretary, Consulate General of Japan, Chicago, Ill."

Bearing the defendant's signature and photograph.

At this time, your Honor, I should like to ask that these four documents be marked for identification in the order in which I am handing them to the bailiff.

(The documents referred to, so produced, were thereupon marked as follows:

Certified copy of letter, bearing date March 2, 1942, Henry L. Stimson, Secretary of War, to Lieutenant General John L. DeWitt, Com-

Exhibit X—(Continued)

(Testimony of Ray Mize.)

mander, Western Defense Command, was marked for identification as Government's Exhibit 3;

Certified copy of Public Proclamation No. 1, Headquarters, Western Defense Command and Fourth Army, bearing date March 2, 1942, was marked for identification as Government's Exhibit 4; [23]

Certified copy of Public Proclamation No. 3, Headquarters, Western Defense Command and Fourth Army, bearing date March 24, 1942, was marked for identification as Government's Exhibit 5;

Certified copy of Public Proclamation No. 5, Headquarters, Western Defense Command and Fourth Army, bearing date March 30, 1942, was marked for identification as Government's Exhibit 6.)

Mr. Donaugh: I should like to display these to counsel, please.

The Court: Yes.

Mr. Bernard: No objection.

Mr. Donaugh: At this time, your Honor, I desire to offer in evidence Government's Exhibits 3, 4, 5 and 6.

The Court: Any objection?

Mr. Bernard: No objection.

The Court: They are admitted.

Mr. Donaugh: These documents being certified

Exhibit X—(Continued)

(Testimony of Ray Mize.)

copies of the authority of General J. L. DeWitt and Public Proclamations 1, 3 and 5 issued by Lieutenant General J. L. DeWitt, United States Army, Commanding The Western Defense Command and Fourth Army.

(The documents referred to, so offered and received, having previously been marked for identification, were thereupon marked received as Government's Exhibits 3, 4, 5 and 6.) [24]

Mr. Donaugh: You may cross-examine.

The Court: Reading is waived, I take it?

Mr. Bernard: Yes, we will waive the reading of them at this time, your Honor.

Cross Examination

By Mr. Bernard:

Q. There was just one statement, Mr. Mize, I didn't get quite clearly and I would like to check with you. Did I understand you to say that he told you that the reason that he had resigned was that he felt that he then could not be a loyal American and keep his employment in the Consul General's office?

A. He implied as much, Mr. Bernard.

Mr. Bernard: That is all.

Mr. Donaugh: That is all, Mr. Mize.

Mr. Bernard: Oh, wait, there is one question: Did you ever get any message, left on your desk or otherwise, that Mr. Yasui had called to see you again and you were not in?

Exhibit X—(Continued)

(Testimony of Ray Mize.)

A. Not that I recall, Mr. Bernard.

Mr. Bernard: That is all.

(Witness excused.)

Mr. Donaugh: Call Mr. Wagner. [25]

DEWART E. WAGNER

was thereupon produced as a witness in behalf of the United States of America, plaintiff herein, and was examined and testified as follows:

The Clerk: State your name, please.

A. Dewart E. Wagner.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Donaugh:

Q. Now, Mr. Wagner, if you will state your name for the record, please.

A. I believe he has it: Dewart E. Wagner.

Q. And what is your business or occupation, Mr. Wagner?

A. I am Director of Vital Statistics for the State of Oregon.

Q. And for what department?

A. Vital Statistics, in the State Board of Health.

Q. State Board of Health; and where are your headquarters?

Exhibit X—(Continued)

(Testimony of Dewart E. Wagner.)

A. Fifth and Oak, Oregon Building.

Q. And what do you mean by the Department of Vital Statistics?

A. We receive and file all birth and death certificates for the State of Oregon.

Q. That includes Hood River County, Oregon?

A. Yes.

Q. How long have you been so employed?

A. Six years. [26]

Q. And continuously for the past six years?

A. Except for one year when I had leave of absence.

Q. And in connection with your official duties do you have the custody of the birth records in the state of Oregon as possessed by your department at this time? A. I do.

Q. What records, if any, do you have concerning the defendant, Minoru Yasui?

A. I have a record here, which I was requested to look up, which is a birth certificate of a child named Minoru Yasui, born October 19, 1916, in Hood River.

Q. Any other information shown on the certificate as to parentage, race, any information pertaining as to who the individual is?

A. Parentage, Masuo Yasui and Shidzu Miyake; residence, Hood River, Oregon; race of father, Japanese, aged 29; race of mother, Japanese, aged

Exhibit X—(Continued)

(Testimony of Dewart E. Wagner.)

27. Birthplace of father, Japan; birthplace of mother, Japan. Occupation of father, merchant. This certificate was filed at the time of birth.

Q. That is an official State record of your office, is that right? A. Yes.

Q. Is the page detachable, Mr. Wagner?

A. Not, it is not. The handwriting on the bottom is that of—

Q. (Interrupting) I mean is the page detachable from your book?

A. It is not. It was bound in 1916. [27]

Mr. Donaugh: At this time, your Honor, I should like to have the document from which the witness has testified marked for identification.

Mr. Bernard: No objection.

Mr. Donaugh: Q. Pardon me, Mr. Wagner, do you have a certified copy of this document with you?

A. I do not. I could procure one.

Mr. Bernard: Mr. Burdell spoke to me about this the other day. I told him that I had a certified copy of the birth record, which I hold in my hand, which I would make available to him if he wanted it. I have also made a copy of that in our office, which has been checked very carefully, and if this certified copy of ours is used I would like to have the copy substituted in its place, as the Japanese find it necessary to have these birth certificates in their possession.

Exhibit X—(Continued)
(Testimony of Dewart E. Wagner.)

Mr. Donaugh: The Government is not doubting the authenticity of the copy, and yet I believe that if later this document is to be replaced it could be replaced by a certified copy. I was going to suggest to your Honor when this has been examined and I move for its admission it is with the proviso that it may later be released and a certified copy substituted for the record.

The Court: Mark it for identification.

(Certificate of Birth of Minoru Yasui, registered No. 159, Oregon State Board of Health, Division of Vital Statistics, page numbered 154, so pro- [28] duced, was thereupon marked for identification as Government's Exhibit 7.)

Mr. Bernard: No objection.

Mr. Donaugh: At this time I desire to offer the exhibit in evidence.

The Court: It may be received without objection.

(The document referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Government's Exhibit 7.)

Mr. Donaugh: May we at a later time, your Honor, substitute a certified copy for the exhibit so received?

The Court: The Court at a later period will receive favorably a motion to remove this original

Exhibit X—(Continued)

(Testimony of Dewart E. Wagner.)

from the files and substitute a photostatic copy of both sides of the document, if there is no objection.

Mr. Bernard: No objection, your Honor.

The Witness: May I ask a question, your Honor?

The Court: Yes.

A. I could have that back, however, can I not?

The Court: What?

A. I can take the book back with me? We will be seriously crippled in our office without it.

The Court: Well, I am sorry, but you can't. Proceed.

Mr. Donaugh: That is all, Mr. Wagner. [29]

Cross-Examination

By Mr. Bernard:

Q. I think you read all of that document except one entry. It lists the occupation of the mother as housewife. A. I don't recall.

Q. That is all right; it is in evidence. Will you hand it to the witness and let him — because everything else has been read into the record, and that was my recollection. You read the occupation of the father from the certificate. What is the occupation of the mother? A. Housewife.

Mr. Bernard: That is all.

Mr. Donaugh: That is all, Mr. Wagner.

The Witness: Your Honor, we need this book badly, and in my official capacity could I detach

Exhibit X—(Continued)

(Testimony of Dewart E. Wagner.)

that page, to be replaced later? Many deserving people will be out of work, and there are boys in this book who are joining the Army and Navy that have to have their birth certificates immediately, and if we don't have this book—on my authority can I take out the page, to be replaced later, and take the book back?

The Court: As far as this Court is concerned, it is introduced in evidence. If you want to make arrangement with the United States Attorney it is all right, but as far as the Court is concerned the book is in evidence and must remain there. Talk to the United States Attorney, if you wish.

(Witness excused.) [30]

Mr. Donaugh: This case has progressed a little more rapidly than the Government had anticipated, your Honor. We had one witness whom we desired to present who is not here, but I think he may be replaced by another witness, if I could have a little time.

The Court: It is now eleven o'clock. The Court will be in recess.

(A short recess was thereupon had, after which proceedings were resumed as follows:)

Mr. Donaugh: May it please your Honor, two witnesses for the Government who in our opinion have material testimony are not at the moment available. One man is on his way here to Portland who lives out of the city and will be here at 1:30.

Exhibit X—(Continued)

One witness is a resident of Portland, and I have requested him to immediately come to the Court House, but it will be a few minutes before he can come here. At this time, if the Court is agreeable, we should like to have sufficient time for these witnesses to come here and be available in this case. The Government takes the responsibility for the man who is not here. I had rather anticipated that we would not get to him before 1:30 and I told him this morning by telephone that if he was here by 1:30 I thought that would be sufficient, but I find that we are in error as to this particular man.

The Court: Any objection on the part of the defense?

Mr. Bernard: No, your Honor. [31]

The Court: The Court will adjourn these proceedings until two o'clock this afternoon.

Mr. Bernard: I might state to your Honor that I have prepared a memorandum in this case and I intended to hand it up to your Honor when the case started, but I will do that now.

The Court: Have you served a copy on the Government?

Mr. Bernard: Yes, I will give them a copy now.

The Court: Have you been served with the Government's brief, Mr. Bernard?

Mr. Bernard: Yes, I got a copy of it this morning, your Honor.

Exhibit X—(Continued)

The Court: Court is in recess until two o'clock.

(At 11:25 o'clock A. M., Friday, June 12, 1942, a recess was had until 2:00 P. M.) [32]

Afternoon Session**2:05 P. M.**

Mr. Donaugh: Call Mr. Davis.

ALAN DAVIS

was thereupon produced as a witness in behalf of the United States of America, plaintiff herein, and was examined and testified as follows:

The Clerk: State your full name, please.

A. Alan Davis.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Donaugh:

Q. State your name, Mr. Davis.

A. Alan Davis.

Q. And you are engaged in what business or occupation?

A. Special Agent, Federal Bureau of Investigation.

Q. And were you a Special Agent of the Federal Bureau of Investigation in March, 1942?

A. I was.

Exhibit X—(Continued)

(Testimony of Alan Davis.)

Q. And where were you stationed during that time? A. The Portland office.

Q. Did you have occasion to talk to the defendant, Minoru Yasui? A. Yes, sir.

Q. Will you state when and where you talked to him?

A. It was in the late afternoon of March 30th, 1942, in the [33] Portland office, Portland Field Division.

Q. And by that you mean the Federal Bureau of Investigation? A. Yes, sir.

Q. Anyone present besides yourself?

A. Yes; Special Agent Mize, of the FBI.

Q. Will you state the nature of the conversation you had with the defendant at that time.

A. Mr. Mize had been discussing affairs with Mr. Yasui at the time I entered the room, and I had previously known Mr. Yasui at the University of Oregon and I started talking with him, regular conversation. Mr. Mize was asking certain questions, and we were discussing the patriotism of the Japanese, and, as I recall, the question was asked Mr. Yasui by Mr. Mize as to the loyalty of the Japanese in Oregon, whether he could depend upon them or say that he could depend upon them in case there might be an attempted invasion in this country, whether he, who might be in charge of the affairs in this country, would detain all the Japanese, including the aliens as well as the American-

Exhibit X—(Continued)

(Testimony of Alan Davis.)

born Japanese citizens. Mr. Yasui at that time more or less hesitated in answering the question, but he stated quite definitely that he would intern not only the aliens but also the American-born Japanese in that case. We discussed various other things. Most of them were mostly our school days and things that had no interest in this matter.

Q. You had known the defendant previously, had you? [34] A. Yes, sir.

Q. At the University of Oregon?

A. Law School and prior to our entrance in Law School, yes, sir.

Q. Now, the circumstances under which Mr. Yasui talked with you and with Mr. Mize were what? Where were you and what were the surrounding circumstances and conditions under which he talked and discussed this matter with you?

A. Well, as I can recall, Mr. Yasui had been in the office previously and we had discussed various things. He had been arrested by the Portland Police Department for violation of the curfew and he was at the office, I believe, to see Special Agent Quinn and I had merely talked and said "Hello" to him at that time, and it was on March 30th that he was up talking with Mr. Mize in the afternoon and I walked into the office and started in talking with him at that time. I was not trying to solicit any information from him regarding Japanese activities or his own activity, merely

Exhibit X—(Continued)

(Testimony of Alan Davis.)

sitting in more or less in the interview that Mr. Mize was conducting.

Q. Was there any discussion at all as to what consideration he would receive by you should he testify or speak to you about this matter?

A. No, sir.

Q. No threats or—

A. (Interrupting) No, sir.

Q. (Continuing) —duress of any kind? [35]

A. No, sir.

Q. Promises? A. None.

Q. He seemed to be, other than the matter of hesitation you speak of, he seemed to be talking freely and with ease to you? A. Yes, sir.

Q. Was that the only occasion that you discussed this case with him?

A. We had talked prior to that, I think a week or so before that. I had made no notes on it and I cannot recall the discussion, although we did discuss that it was the Japanese that were at war and we talked of that, and we talked of his employment with the Japanese Consul in Chicago. We told him—I was more or less curious at the time whether agents had contacted him while he was at Chicago, and we discussed that matter.

Mr. Donaugh: I think that is all.

Cross Examination

By Mr. Bernard:

Q. Now, as I understand it, Mr. Davis, you came

Exhibit X—(Continued)

(Testimony of Alan Davis.)

in on March 30th when Mr. Yasui had already been engaging in a conversation with Mr. Mize?

A. Yes, sir.

Q. And something came up about locking up the Japanese to prevent sabotage?

A. I did not mention sabotage, no, sir. [36]

Q. Locking them up for what purpose?

A. Well, for protection of this country.

Q. Well, in what way?

A. Well, I would assume that he meant that he would be unable to trust the Japanese on the West Coast.

Q. Pardon me, I am asking you what he said about that. I want to know what he said about that.

A. Well, he stated that if he had anything to do with it and there might be an attempted invasion of this country he would detain aliens as well as the citizens.

Q. And how did he come to say that, do you remember? What brought that up?

A. The question was asked by Mr. Mize, as I recall, that if he should be in charge of military affairs in this country, or on the West Coast, what he might do under those circumstances.

Q. Now, let me refresh your recollection. Isn't this about what happened, that somebody was pressing the subject as to how the commander of the army would be absolutely sure of the protection of the country without locking up the Japanese, and

Exhibit X—(Continued)

(Testimony of Alan Davis.)

Mr. Yasui said, "Well, if you wanted to be absolutely sure I suppose they would be locked up", and that somebody remarked, "To the same extent that if God wanted to be absolutely sure that there wouldn't be any wars fought, why, we should kill off all the human beings." Now, does that refresh your recollection any? A. No, sir. [37]

Mr. Bernard: I see. That is all.

Mr. Donaugh: That is all, Mr. Davis.

(Witness excused.)

Mr. Donaugh: At this time we call Dr. Everson.

[38]

W. G. EVERSON

was thereupon produced as a witness in behalf of the United States of America, plaintiff herein, and was examined and testified as follows:

The Clerk: State your name, please.

A. W. G. Everson.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Donaugh:

Q. Now, Dr. Everson, your full name is William G. Everson? A. William G. Everson.

Q. And what is your profession, Doctor?

A. President, Linfield College.

Exhibit X—(Continued)

(Testimony of W. G. Everson.)

Q. At McMinnville, Oregon?

A. At McMinnville, Oregon.

Q. And prior to that you were located where?

A. As pastor of the First Baptist Church, the White Temple, Portland, Oregon.

Q. I believe you have had military experience, Doctor? A. Yes, sir.

Q. At one time you held a commission in the United States Army? A. Yes, sir.

Q. What was the highest rank you achieved in the United States Army?

A. As a Major General, Chief of the National Guard Bureau.

Q. And during what period were you the Chief of the National [39] Guard Bureau?

A. About '29-'31.

Q. Do you occupy any official position in connection with the war activities at the present time?

A. Chairman, Enemy Alien Hearing Board.

Q. And for what locality or district?

A. District of Oregon.

Q. And you were appointed by whom?

A. By the United States Attorney, Mr. Biddle.

Q. United States Attorney General?

A. United States Attorney General, Mr. Biddle.

Q. Now, in connection with your duties as Chairman of the Alien Enemy Hearing Board for Oregon, have you or the other members of the Board

Exhibit X—(Continued)

(Testimony of W. G. Everson.)

in association with you at any time contacted or interviewed the defendant, Minoru Yasui?

A. Yes, we had some contacts with him during his hearing in February, February 3rd, at Missoula, Montana, and this was in connection with a hearing conducted in behalf of his father; this young man appeared in behalf of his father.

Q. And this hearing was held where?

A. At Missoula, Montana, Fort Missoula.

Q. Fort Missoula, Montana? A. Yes, sir.

Q. And the father of the defendant was confined at Fort Missoula at that time? [40]

A. Yes, sir.

Q. Do you know his nationality?

A. Japanese.

Q. Japanese; and did the father appear before the Alien Enemy Hearing Board and yourself?

A. Yes, sir.

Q. And in what capacity was the defendant there? Why was he there?

A. The regulations permit a friend or a relative to appear, and the son appeared as a relative to testify in behalf of his father.

Q. Did he in so testifying discuss himself and his own activities?

A. Yes. He informed us that he was a Second Lieutenant in the United States Reserve and was to be ordered to active duty inside of two weeks, and when he made that statement I asked him if he

Exhibit X—(Continued)

(Testimony of W. G. Everson.)

had received orders for his physical examination. He said, "No", and I asked that question because I felt that anyone being ordered up for active duty inside of two weeks would certainly have orders for physical examination; and I asked him why he knew he was to be ordered up inside of two weeks, and he said that was the normal procedure.

Mr. Bernard: I didn't get the last part of that answer.

A. When I asked him why he knew that he was to be ordered up for active duty inside of two weeks he said, "That is the normal procedure." [41]

Mr. Donaugh: Q. Was anything said in your presence, Doctor, concerning the employment of the defendant and where he had been employed prior to his appearance before your Board?

A. Yes; he was employed in connection with the Consul General's office in Chicago up to the—

Q. (Interrupting) What Consul General's office?

A. The Japanese Consul General's office in Chicago,—up to December 7th, when he stated he had resigned.

Q. Do you recall if anything was said concerning how he happened to be employed by the Japanese Consul General in Chicago?

A. Yes; he said that the information was that the Japanese Consul General appointed by the authorities in Japan was to arrive in San Francisco,

Exhibit X—(Continued)

(Testimony of W. G. Everson.)

and his father sent a letter of recommendation which secured for him the appointment as a secretary, and then afterwards this developed into a public relations assignment.

Q. Do you recall if anything was said as to the period of time during which he applied for a secretary's job? In other words, the ease or the difficulty with which he secured his position with the Japanese Consul General?

A. There seemed to be no difficulty at all and all that was necessary was the writing of a letter and the appointment came through immediately.

Q. And by the writing of the letter you mean the letter of the father to which you testified?

A. The letter of the father to this Japanese Consul General. [42]

Q. Now, when this statement was made was the father present? A. Yes.

Q. And heard the defendant make the statement to which you are now testifying? A. Yes.

Q. Now, I believe you stated that he first was employed as a secretary? A. Yes, sir.

Q. And then later in what capacity?

A. As public relations man in behalf of the Consul General.

Q. Did he explain what he meant by "public relations man"?

A. Yes; he said he wrote a good many letters and made speeches, and these speeches were in behalf

Exhibit X—(Continued)**(Testimony of W. G. Everson.)**

of the Japanese program in opposition to the Chinese; and he also stated that these speeches were usually looked over by the Japanese Consul General.

Q. And by that statement, Doctor, when you state that the Japanese Consul General looked over these speeches, do you mean by that—when do you mean he looked over these speeches?

A. Prior to the delivery.

Q. How many of these speeches were delivered?

A. I do not know.

Q. Well, do you recall whether there was any statement made as to whether one speech was delivered or more than one?

A. Yes, he said that he delivered several speeches, and I recall he referred, as one illustrative, to Kankakee. [43]

Q. Do you know how the invitations were received which caused the defendant to go out and deliver these speeches on behalf of the Japanese Consul General? A. No, I do not.

Q. Was anything said concerning the commission of the defendant in the United States Army during this time of employment by the Japanese Consul General and the delivery of these speeches, in behalf of the defendant? (Sic)

A. He held his commission during this period, commissioned on graduation because he was con-

Exhibit X—(Continued)

(Testimony of W. G. Everson.)

nected with the R. O. T. C. at a state institution,
the University.

Mr. Donaugh: I believe that is all, Doctor.

Cross Examination

By Mr. Bernard:

Q. Doctor, I didn't get exactly that part of your testimony where you mentioned the name "Kankakee". What was there about that? I didn't follow you there.

A. I understood that the statement was made that he gave speeches in various civic groups through organizations in towns around Chicago, and there may have been several towns mentioned but the only one that lingers in my mind was Kankakee. Now, why that should linger I don't know, but that was brought up in connection with the statement.

Q. Dr. Everson, just one thing in regard to your testimony: Do you recall him saying up there that in order to get this position [44] in Chicago that he also got letter of recommendations from Wayne L. Morse, Dean of the University of Oregon Law School?

A. No, I do not.

Q. You don't recall that?

A. No, sir.

Q. He might have said that?

A. I do not recall.

Q. You do not recall, but it might have slipped your memory?

A. I do not recall it.

Exhibit X—(Continued)
(Testimony of W. G. Everson.)

Mr. Bernard: I see. That is all.

Mr. Donaugh: That is all, Doctor.
(Witness excused.)

Mr. Donaugh: Call Mr. Scott. [45]

LESLIE M. SCOTT

was thereupon produced as a witness in behalf of the United States of America, plaintiff herein, and was examined and testified as follows:

The Clerk: State your name, please.

A. Leslie M. Scott.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Donaugh:

Q. Your name is Leslie M. Scott?

A. That is correct.

Q. And I believe, Mr. Scott, that you are the State Treasurer of Oregon? A. I am.

Q. Have you had any connection, Mr. Scott, with the alien enemy situation in Oregon?

A. A member of the Board for this state.

Q. Of the Alien Enemy Hearing Board?

A. Yes.

Q. And in connection with your duties as a member of the Alien Enemy Hearing Board have you before today seen the defendant or have you

Exhibit X—(Continued)

(Testimony of Leslie M. Scott.)

talked with him or he talked in your presence at any time?

A. At Fort Missoula, on February 3rd, at a hearing of the Board, Mr. Yasui testified in behalf of his father. [46]

Q. And that was where?

A. At Fort Missoula, Montana.

Q. Do you recall, Mr. Scott, what the defendant on that occasion said with respect to his own activities and employment? Did he state to the Board anything concerning himself?

A. He did. In response to inquiries of members of the Board he stated that he had been in the service of the Japanese Consul General at Chicago as secretary to the Consul General and as a public relations agent or representative.

Q. Was anything said in regard to his duties as public relations representative?

A. He was to attend to the correspondence of the Consul General, he, Mr. Yasui, having ready command of English, and he was to make speeches on subjects approved by the Consul General. The subject matter of these speeches was approved by the Consul General.

Q. Was anything said as to how many speeches were delivered or how active the defendant was in that connection?

A. I don't know how numerous they were. I gained the impression that they were rendered on

Exhibit X—(Continued)

(Testimony of Leslie M. Scott.)

a number of occasions before groups of American citizens.

Q. Did he say what the subjects of these talks were?

A. They pertained to the conduct of the Japanese war against the Chinese, justification of Japanese policy toward China, in justification of the war against China. [47]

Q. Was there any discussion had before your Board concerning the delivery of these speeches by the subject, or, rather, the defendant, as an employee of the Japanese Consul General's office and also as an officer in the United States Army?

A. The method of his gaining this employment was narrated by Mr. Yasui in response to questions of members of our Board. He said that he had graduated a short time before from the University of Oregon Law School, and his father was desirous of making a connection for him with the Japanese Consul General. His father had heard that the Japanese Consul General was soon to land in San Francisco, coming from Japan. The father, Mr. Yasui, wrote a letter—this was brought out in the testimony given by Mr. Yasui, Junior,—the father wrote a letter to the Consul General at San Francisco describing the qualifications of the young man and furnishing a number of recommendations. What the recommendations were or from whom, I

Exhibit X—(Continued)

(Testimony of Leslie M. Scott.)

don't believe they were mentioned at the time of this hearing, or how many such letters there were.

Q. I take it, then, from your testimony that his employment with the Japanese Consul General was on the basis of the recommendation of his father, is that correct?

A. That was the distinct impression that the Board received.

Q. And the father was also before your Board?

A. The father was before our Board at the time and the son appeared as friend or relative or advisor of his father.

Q. And the hearing that you conducted and the purpose of your [48] Board being in Fort Missoula concerned the father, do I understand?

A. It concerned the father and not the son.

Q. And what was the nationality of the father?

A. The father is a native-born Japanese. The son, it was brought out before the Board, was born in the United States; he was 25 years of age last February; at least, that was the testimony of himself. The father came to the—well, the father had given the son the advantages of an American education.

The Court: I take it, Mr. Donaugh, that these are things that were said by the defendant? I am not reviewing the testimony that may have happened or come in before the Board in Missoula which was not given by the defendant.

Mr. Donaugh: Q. As I understand your testi-

Exhibit X—(Continued)

(Testimony of Leslie M. Scott.)

mony, Mr. Scott, your testimony here is based on the testimony of the defendant before you at the time he appeared as a witness; is that correct?

A. That is correct.

Mr. Donaugh: I believe that is all at this time.

Mr. Bernard: That is all. No cross-examination.

(Witness excused.)

Mr. Donaugh: May it please your Honor, with the permission of the Court, may I at this time specifically, and for the purpose of the record, quote from the Government's Exhibits 3, 4, 5 and 6, as to the nature of the exhibits and what they imply.

Government's Exhibit Number 3 is a certified copy, [49] dated March 2, 1942, in the form of a letter directed by Henry L. Stimson, Secretary of War, to Lieutenant General John L. DeWitt, Commander, Western Defense Command, San Francisco, California. It states, in part, in paragraph one:

"By letter dated January 20, 1942, I designated you as one of the appropriate Military Commanders to exercise the powers vested in me under Executive Order No. 9066, February 19, 1942, and I delegated to you such powers as are necessary to carry out the purposes of that Executive Order."

Secretary Stimson follows with this line: "In-
cident to the exercise of those powers, you are au-
thorized to employ without regard to Civil Service

Exhibit X—(Continued)

or Classification laws or regulations, all persons or agencies necessary to carry out your duties."

The balance of paragraph one and paragraphs two and three have certain instructions and directions to General DeWitt with respect to the manner in which he may employ personnel to carry this order into execution.

Government's Exhibit Number 4 is what is known as Public Proclamation No. 1, certified as an official copy, issued from the Headquarters, Western Defense Command and Fourth Army, The Presidio of San Francisco, California, under the signature of J. L. DeWitt, Lieutenant General, United States Army, Commanding, dated March 2, 1942, which recites:

"Whereas, By virtue of orders issued by the War [50] Department on December 11, 1941, that portion of the United States lying within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona and the Territory of Alaska has been established as the Western Defense Command and designated as a Theater of Operations under my command; and

"Whereas, By Executive Order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any such designated commander deems such action necessary or desirable, to prescribe military areas in

Exhibit X—(Continued)

such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion; and

"Whereas, The Secretary of War on February 20, 1942, designated the undersigned as the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command; and

"Whereas, The Western Defense Command embraces the entire Pacific Coast of the United States which by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and [51] acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations:

"Now, Therefore, I. J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

Exhibit X—(Continued)

"1. The present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones thereof as defined in Exhibit 1, hereto attached, and as generally shown on the map attached hereto and marked Exhibit 2."

Then, your Honor, without reading further from the exhibit, from Government's Exhibit 4, there is herein set forth as Exhibit 1 a description of Military Area No. 1, and there is likewise herein set forth what is known as Exhibit No. 2, a sketch or map showing the territory previously described, in which a certain area along the Pacific Coast extending from the borderline of the Dominion of Canada south is marked under the "Military Area Legend", "Prohibited Zone 'A-1'", and from this map it is shown that Portland is included in the area classified as "Prohibited Zone 'A-1'".

Government's Exhibit Number 5, this being an official certified copy, issued by Headquarters, Western Defense Command [52] and Fourth Army, Presidio of San Francisco, California, Public Proclamation No. 3, dated March 24, 1942, bearing signature "J. L. DeWitt, Lieutenant General, U. S. Army, Commanding."

The recitation in Public Proclamation No. 3 is similar to the recitation of powers I have heretofore recited, with this specific provision:

"Whereas, The present situation within these

Exhibit X—(Continued)

Military Areas and Zones requires as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones thereof:

"Now, Therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare and establish the following regulations covering the conduct to be observed by all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the military Areas above described, or such portions thereof as are hereinafter mentioned:

"1. From and after 6:00 A.M., March 27, 1942, all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1, or within any of the Zones established within Military Area No. 2, as those areas [53] are defined and described in Public Proclamation No. 1, dated March 2, 1942, this headquarters, or within the geographical limits of the designated Zones established within Military Areas Nos. 3, 4, 5, and 6, as those areas are defined and described in Public Proclamation No. 2, dated March 16, 1942, this headquarters, or within any

Exhibit X—(Continued)

of such additional Zones as may hereafter be similarly designated and defined, shall be within their place of residence between the hours of 8:00 P.M. and 6:00 A.M., which period is hereinafter referred to as the hours of curfew."

This proclamation, Government's Exhibit Number 5, relates to other matters, with particular reference to a regulation concerning prohibited articles, which are not involved in this case.

Government's Exhibit No. 6 is a certified copy of Public Proclamation No. 5, likewise issued under the signature of J. L. DeWitt, Lieutenant General, U. S. Army, Commanding Western Defense Command and Fourth Army, and relates to Proclamations 1 and 2 heretofore issued, by setting forth the classes of persons which may be considered by the military authorities to be exempted from exclusion and evacuation upon furnishing of satisfactory proof to the military authorities.

May it please your Honor, at this time I should like to have these documents marked for identification.

(The documents referred to, so produced, were thereupon marked as follows: [54]

Certified copy of General Orders No. 1, Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California, dated December 11, 1941, signed "J. L. DeWitt, Lieutenant General, U. S. Army, Commanding", was marked for identification Government's Exhibit 8;

Exhibit X—(Continued)

Certified copy of Telegram, bearing date December 11, 1941, addressed to "Commanding General, Fourth Army, Pres. of SF, Calif," signed "Marshall", was marked for identification as Government's Exhibit 9.)

Mr. Bernard: No objection.

Mr. Donaugh: At this time I desire to offer Government's Exhibits for identification Nos. 8 and 9 in evidence.

The Court: Admitted.

(The documents referred to so offered and received having previously been marked for identification were thereupon marked received as Government's Exhibits 8 and 9.)

Mr. Donaugh: Government's Exhibit Number 8 reads as follows:

"Headquarters Western Defense Command and
Fourth Army

"Presidio of San Francisco, California.

"December 11, 1941

"General Orders

"Number 1

"1. The following War Department radiogram, December 11, 1941, is quoted for the information and guidance of all concerned:

"The activation of the Western Defense Command [55] including Alaska, is hereby confirmed. It is designated as a theater of operations. The Fourth Army, Second Air

Exhibit X—(Continued)

Force, Fourth Air Force and Ninth Corps Area, including attached units are assigned to this command. Lieutenant General John L. DeWitt is designated as commander.

"2. Pursuant to the authority contained in the radiogram quoted above, the undersigned assumes command of the Western Defense Command and retains command of the Fourth Army.

"J. L. DeWITT,

"Lieutenant General, U. S.

"Army, Commanding."

Government's Exhibit Number 9 reads as follows:

Priority "Washington DC Dec 11, 1941 621PM
"Commanding General
"Fourth Army
"Pres of SF, Calif

"The activation of the Western Defense Command including Alaska, is hereby confirmed. It is designated as a theatre of operations. The Fourth Army, Second Air Force, Fourth Air Force and Ninth Corps Area, including attached units are assigned to this command. Lieutenant General John L. DeWitt is designated as commander.

"MARSHALL"

The Government rests, your Honor.

(Government rests.) [56]

Exhibit X—(Continued)**Defense Testimony.**

Mr. Bernard: Mr. Yasui, will you take the stand.

MINORU YASUI,

the defendant herein, was thereupon produced as a witness in his own behalf and was examined and testified as follows:

The Clerk: Your name is Minoru Yasui? Just state your name. **A.** Minoru Yasui.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Bernard:

Q. Your name is Minoru Yasui?

A. That is correct.

Q. And you are the defendant in this criminal action, are you? **A.** I am, sir.

Q. The record introduced by the Government shows that your birth was on October 19, 1916, at Hood River, Oregon. Does that conform with your information that that is the date of your birth?

A. It does, sir.

Mr. Bernard: I would like to have this marked for identification, please.

(Stipulation entitled in the above entitled cause, between Charles S. Burdell, of attorneys of the United States of America, and E. F. Bernard, Attorney for the Defendant, was thereupon marked [57] for identification as Defendant's Exhibit 10.)

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Mr. Burdell: Oh, I have no objection.

The Court: Admitted.

(Said stipulation, so offered and received, having previously been marked for identification, was thereupon marked received as Defendant's Exhibit 10.)

Mr. Bernard: I would like to say, your Honor, this is a stipulation entered into by the Government and myself whereby certain facts are admitted in the case.

“In the District Court of the United States
“For the District of Oregon

“UNITED STATES OF AMERICA,

Plaintiff,

vs.

“MINORU YASUI,

Defendant.

STIPULATION

“It is hereby stipulated by the parties to the above entitled action that at the trial of the action the following facts are admitted to be true and proof thereof is waived, to wit:

“During and prior to the year 1916 and at the time of the birth of the defendant, Minoru Yasui, the father of the defendant, Masuo Yasui, and Shidzu Yasui Yasui, his wife, the mother of the

Exhibit X—(Continued)

(Testimony of **Minoru Yasui**.)

defendant were residents and inhabitants of Hood River, Oregon; that during all of [58] said time, the defendant's father hereinbefore named was engaged in business in Hood River, Oregon, as a merchant, and that during all of said times, the defendant's mother hereinbefore named was a house-wife, and that neither of the defendant's said parents were in the diplomatic service of any country.

"**CHARLES S. BURDELL,**

Of Attorneys of the United States of America

"**E. F. BERNARD,**

Attorney for the Defendant"

Mr. Burdell: May it be understood, your Honor, that that stipulation is only for the purpose of this case?

The Court: I don't know exactly what that means. Either it is a fact or it isn't a fact. In other words, this Court refuses to try some moot question that is set up by the attorneys for the defense and the Government.

Mr. Burdell: All right, it may be stipulated as a fact, your Honor.

The Court: Stipulation received in evidence.

Mr. Bernard: There has been introduced in evidence here a birth registration. Was your birth ever recorded in any other place?

A. No, it has not.

Q. And, in that connection, I will ask you

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

whether or not you have ever in your life time received any questionnaire or request for [59] information from the government of Japan relative to you or your willingness to engage in any military activity or any activity in Japan?

A. I have received no such questionnaire from the government of Japan.

Q. Or have you given any information voluntarily along that line?

A. No, sir, I have not.

Q. From your earliest recollection, Mr. Yasui, what was your father's business?

A. Well, from my earliest recollection he has always been a merchant in Hood River, Oregon. /

Q. And did he engage in business as a merchant up to the time he was detained by the Government?

A. He was, together with agricultural pursuits and farming.

Q. And was your mother's occupation—did she continue as a housewife throughout the years?

A. She did.

Q. Did you ever take a trip to Japan?

A. Yes, sir, I did.

Q. In what year?

A. To the best of my recollection it was in 1925, I think at the age—when I was about eight years old. We left the United States sometime in July and returned approximately in September. It was just merely a summer vacation.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. Was that merely a vacation trip? [60]

A. Yes, to the best of my recollection it was.

Q. Well, did anything particular happen that you recall in Japan at that time that impressed itself on your recollection?

A. Well, no particular factor, Mr. Bernard.

Q. Were you asked when you were over there to take any oath of allegiance or do anything towards taking out citizenship in Japan?

Mr. Burdell: Object to that as immaterial, your Honor.

The Court: The objection is sustained.

Mr. Bernard: I wish to make an offer of proof, your Honor. I offer to prove by this witness that while he was in Japan at that time he did not take an oath of allegiance to Japan or any other country or take any steps to become a citizen of Japan.

The Court: He couldn't. He was a minor. He had no election until after he had passed the age of twenty-one.

Mr. Bernard: I take it, then, the ruling is against me.

The Court: Yes; you may put in an offer of proof.

Mr. Bernard: I would like an exception.

The Court: You may state an offer of proof and I will—

Mr. Bernard: What is that?

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

The Court: You may state an offer of proof and I will give you an exception.

Mr. Bernard: Well, I think I dictated it into the record. Will you read it.

(The offer of proof was thereupon read by the reporter.) [61]

Mr. Burdell: Object to that as incompetent, irrelevant and immaterial.

The Court: The objection is sustained and the offer of proof is rejected.

Mr. Bernard: May we save an exception?

The Court: Yes, sir.

Mr. Bernard: Q. Where did you go to school?

A. Well, I started grammar school in Hood River; finished high schools, also, at Hood River.

Q. By the way, this trip that you took to Japan when you were about ten years old, were you ever in Japan after that?

A. No, sir, I have never been in Japan since that time.

Q. Were you ever in any foreign country after that?

A. Yes, I believe once in Mexico, in 1937; we crossed the border near some small town to the south of San Diego.

Q. And how long were you there?

A. I think four hours.

Q. Ever resided in any foreign country at all?

A. No, sir.

Exhibit X—(Continued)
(Testimony of Minoru Yasui.)

Q. After you finished high school in Hood River where did you go to school?

A. I attended the University of Oregon.

Q. And how long were you at the University of Oregon?

A. I commenced the pre-law career there in 1933, and commenced the Law School in 1936. I received my Bachelor of Arts degree in [62] 1937 and my Bachelor of Laws in 1939.

Q. You were how old, then, when you finished the school?

A. I believe I was twenty-three years when I finished the University of Oregon Law School.

Q. Have you voted in the United States?

A. I have, sir.

Q. Have you ever voted in any other country?

A. No, sir, I have not.

Q. Now, what date do you say you finished the Law School on, Mr. Yasui?

Mr. Burdell: If the Court please, I object to that as incompetent, irrelevant and immaterial.

The Court: Oh, I think it is preliminary. He may answer.

Mr. Bernard: Q. What date did you say you finished the Law School on?

A. In June of 1939.

Q. And when did you go to work for this office of the Consul General in Chicago?

A. The following year, in April, 1940.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. And what did you do in the meantime?

A. Well, pending the results of the bar examination I helped as a ranch hand on my father's farm. In approximately September we heard the results, and having completed the bar I attempted to practice law both in Hood River and, for a short while, in Portland, Oregon. [63]

Q. Now, I wish you would tell the Court how you secured this position in Chicago.

A. To the best of my knowledge, the Japanese Consulate at Chicago was elevated a Consulate General in 1940. There was a need for an enlarged staff at that time. The Consul General newly appointed had been a former Consul here at Portland. There was a letter written by my father to the Consul General stating that I had graduated in law school and that he believed that I would be fit for such a position. I secured letters of recommendation from Dean Wayne L. Morse, of the Oregon Law School, as I recall it a certificate from the Registrar at the University of Oregon, and also various letters of recommendation from people in Hood River and in Portland. Because there was a need for a man who could speak English as well as Japanese and, I suppose also because of some of the records that I had while I attended the University of Oregon, I was selected for that position.

Q. And when did you go to Chicago?

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

A. As I recall, I arrived in Chicago on April 1st, 1940.

Q. Were you required at that time to take any oath of allegiance?

A. I was not required—

Mr. Burdell: (Interrupting) Objected to, your Honor, as incompetent, irrelevant and immaterial.

The Court: Well, I am not sure that it is incompetent, if he took an oath of allegiance after he arrived at the age of majority. [64]

Mr. Burdell: Well, your Honor, the indictment in this case charges a violation of Public 503, which declares, your Honor, any act in violation of any of the orders issued by the Commanding General of the Western Defense Command, and the defendant is charged with violating Public Proclamation No. 3, which provides that all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1 shall observe certain conduct. It is not limited to alien Japanese.

The Court: I know it is not, and that is what makes me doubt its constitutionality; therefore, I hold that the proof is competent to establish whether there be citizenship, notwithstanding that your indictment did not allege that this man was a citizen, therefore, that is the point, I think, in this case, and that is the point that I have asked these gentlemen to be present here as friends of the Court to determine whether or not that is constitutional.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Mr. Burdell: Yes. Does your Honor care to hear argument at this time?

The Court: No, I don't care to have any argument on it right now, because I want to proceed with proof on the subject.

Mr. Burdell: Very well, your Honor.

The Court: And I want to hear proof on both sides, if the question is going to be raised. Proceed.

Mr. Bernard: Would you read the witness the question, Mr. Rauch. [65]

(The question referred to was thereupon read, as follows:

"Were you required at that time to take any oath of allegiance?"

A. I was not required to take any oath of allegiance when I began my employment with the Consulate General in Chicago.

Q. Or were you required to take any oath of allegiance at any time during your employment?

A. No, sir, I was not so required.

Q. And did you, whether you were required or not, take any oath of allegiance at any time from the commencement to the end of your service there in Chicago? A. No, sir, I did not.

Q. Now, will you please state to the Court your duties in that position and what you did.

A. I was employed as a general secretary in charge of the correspondence. There was an American fellow by the name of Bob Murphy and

Exhibit X—(Continued)**(Testimony of Minoru Yasui.)**

myself that handled like duties. We received the morning mail, submitted them to the Consul General, and the Consul General would submit one of the letters to either Murphy or myself to answer, the reason being that, because of our facility with the English language, we could phrase the letter better than the Consul himself. As soon as these letters were drafted we submitted them to him for approval, and if approved we typed them out and sent them out. Also in connection with our duties [66] on various occasions the Rotary Clubs and various civic organizations would call upon the Consul to send a man to explain the position of Japan in the Far East, or perhaps some club or organization would want to know about flower arrangement. I acted as research on such matters and upon such occasions I did go to such civic meetings or ladies' meetings to make such speeches.

Q. You have mentioned Bob Murphy who was doing work similar to yours. Was he an American?

A. Yes, he was a Caucasian American, born, I believe, in Nebraska.

Q. And were there any other white employees?

A. Yes, there was Frances McDougall, who was a naturalized American, who was the typist for the office.

Q. Now, did the nature of your employment change at all during the time that you were there?

A. No, not particularly. The only possible

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

change was that the Consul General himself was recalled in 1941, September I believe the month was, and since that time I acted under the Acting Consul General. That was the only nature of the change.

Q. I believe one of the witnesses testified that you said up in Missoula that you were first a secretary and then a sort of public relations man.

A. Yes, I believe that statement was made.

Q. Well, what about that, Mr. Yasui?

A. Well, as I recall my testimony at Fort Missoula, no such [67] statement was made that I was ever a public relations man. However, I did testify, as I do now, that I did make certain speeches there, if that be so construed as public relations.

Q. And did you make speeches with regard to Japan's position in the war with China?

A. Yes, I did, sir.

Q. Were those speeches that you refer to before public bodies? A. Yes, sir, it was.

Q. I mean clubs, and things of that kind?

A. Yes, sir, like Rotary, I believe.

Q. By the way, what was your salary while you were working there?

A. My salary was one hundred twenty-five dollars per month.

Q. When did you first hear of the attack on Pearl Harbor? A. On December 7, 1941.

Q. When did you resign your position?

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

A. As I recall, on the 8th day of December, 1941.

Q. Did you sever your entire connection with them at that time? A. I did, sir.

Q. And why did you resign?

A. Because I felt that as a loyal American citizen I could not be working for the Japanese Consulate after the declaration of war.

Q. Did you receive any advice on that from anybody?

A. No advice that prompted me to so act, except possibly a telegram from my father, that wired me that now that this country—

Mr. Bernard: (Interrupting) You can't state the contents of it. [68] I would like this wire marked for identification.

(Telegram bearing date December 8, 1941, M. Yasui to Minoru Yasui, so produced, was thereupon marked for identification as Defendant's Exhibit 11.)

Mr. Bernard: Will you hand that to the witness, and ask him if he identifies that as a wire he received from his father.

A. Yes, this is the wire that I received from my father.

Mr. Bernard: I would like to offer the wire in evidence.

Mr. Burdell: The only objection is that it is

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

immaterial. We do object on that ground. The further objection that it is hearsay and self-serving.

The Court: The Court has ruled that it is pertinent to show this defendant is an American citizen or not. That depends on the question of his intention. The intention may be shown by a great many acts or declarations, and the objection that this is self-serving goes simply to the question of weight rather than admissibility. I think it may throw some light on his intention and is admitted.

—(The telegram referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Defendant's Exhibit 11.)

Mr. Bernard: This is a telegram dated December 8th, 1:00 A. M., Hood River, Oregon. "Minoru Yasui, 306 Dearborn Plaza, 1032 North Dearborn Street, Chicago. As war has started your [69] country needs your service as a United States reserve officer. I as your father strongly urge you to respond to the call immediately. M. Yasui."

Q. What did you do about offering your services to your country, Mr. Yasui?

A. Before that—

The Court: (Interrupting) Just a moment. I think that is objectionable.

Mr. Bernard: Well, I don't know what your Honor has in mind. I am offering it also as to his intentions.

The Court: You may ask him what he did

Exhibit X—(Continued)**(Testimony of Minoru Yasui.)**

toward offering his services to Japan or the United States, whichever you wish.

Mr. Bernard: All right, I will confine it to the United States. Did you do anything towards offering your services to Japan? A. I did not.

Q. All right, what did you do towards offering your services to the United States?

A. I immediately wired Headquarters, Second Military Area, at Portland, Oregon, offering my immediate services.

Mr. Bernard: I would like to have this marked for identification.

(Letter, bearing date December 8, 1941, addressed to 2nd Lt. Minoru Yasui, signed "E. P. Curtis, Major, A. G. D., Asst. Adj. Gen.", so produced, [70] was thereupon marked for identification as Defendant's Exhibit 12.)

Mr. Bernard: Q. I will ask you to examine the document which has just been marked for identification and tell me what that is?

A. Yes, this is the letter that I received in answer to the telegram that I sent on December 8th.

Mr. Bernard: We will offer the document in evidence.

Mr. Burdell: We feel that it is immaterial, your Honor.

The Court: Let me see it. The Government has introduced evidence of this man's statements that

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

he was a reserve officer, and this would confirm that. It is therefore received.

(The letter referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Defendant's Exhibit 12.)

Mr. Bernard: (Reading)

"Headquarters Second Military Area

"225 U. S. Court House

"Portland, Oregon

"201-Yasui, Minoru EPC/f

"2nd Lt., Inf-Res. December 8, 1941

"Subject: Extended Active Duty

"To: 2nd Lt. Minoru Yasui, Inf-Res.

1032 N. Dearborn Street

Chicago, Illinois

"1. Receipt of your telegram of December 8, 1941, is [71] acknowledged. Your tender of service is appreciated and has been made of record at this headquarters.

"2. No change in the present War Department policy of ordering officers to active duty to fill existing vacancies has been made. When your name is reached on our priority list for active duty, you will be contacted by this headquarters. In the mean-

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

time, it is suggested that you hold yourself in readiness for an early call to active duty.

“By command of Major General Benedict:

“E. P. CURTIS

“Major, A. G. D.

“Asst. Adj. Gen.”

Mr. Bernard: I hand you what purports to be a telegram, dated December 11th,—and ask first that that be marked for identification.

(Telegram, bearing date December 11, 1941, E. P. Curtis, Assistant Adjutant General, to “2nd Lt. M. Yasui, Inf. Res., 1032 North Dearborn Street”, so produced, was thereupon marked for identification as Defendant's Exhibit 13.)

Mr. Bernard: Q. I ask you to examine it and state what that is?

A. This is a telegram in answer to the second telegram that I had written to the Second Headquarters.

Q. I see. You had sent a second telegram after the one you have previously referred to? [72]

A. Yes, sir, I had.

Mr. Bernard: We will offer in evidence the telegram identified by the witness.

Mr. Burdell: No objection.

The Court: Admitted.

Exhibit X—(Continued)**(Testimony of Minoru Yasui.)**

(The telegram referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Defendant's Exhibit 13.)

Mr. Bernard: (Reading) "December 11, 7:15 P. M. 2nd Lt. M Yasui, Inf Res. 1032 North Dearborn St. Reurtel effective date or details regarding your active duty not yet determined stop await further instructions. E. P. Curtis Asst Adj Gen."

Q. Did you communicate further with the War Department after that?

A. No, not directly from Chicago, to the best of my knowledge.

Mr. Bernard: I will hand you a letter dated March 28, 1942, and ask you—first, I will ask that it be marked for identification.

(Letter, bearing date March 28, 1942, addressed to "2nd Lt. Minoru Yasui, Inf-Res., 704 12th Street, Hood River, Ore.", signed "W. R. Martin, Captain, A. G. D., Asst. Adj. Gen.", so produced, was thereupon marked for identification as Defendant's Exhibit 14.)

Mr. Bernard: **Q.** The letter now having been marked for identification, I will ask you to examine it and state what that is?

A. This is a letter from the Second Military Area Headquarters that I received here in Portland after I had returned from Chicago, stating my status here in the Reserve Officer Corps.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Mr. Bernard: We will offer in evidence the letter identified by the witness.

Mr. Burdell: No objection.

The Court: Admitted.

(The letter referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Defendant's Exhibit 14.)

Mr. Bernard: This says:

“Headquarters Second Military Area
225 U. S. Court House
Portland, Oregon

“201-Yasui, Minoru,

hjs/vjm

“2nd Lt., Inf-Res.

March 28, 1942.

“Subject: Status.

“To: “2nd Lt. Minoru Yasui, Inf-Res.

704-12th Street,

Hood River, Ore.

“The following War Department letter, file and subject as above, dated March 19, 1942, forwarded by 1st indorsement, Hq. Ninth Corps Area, dated March 23, 1942, is quoted for your information and guidance:

“1. Reference is made to your first wrapper indorsement of February 25, 1942, forwarding report of physical examination [74] dated January 19, 1942, of Second Lieutenant Minoru Yasui, In-

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Infantry Reserve, (O-360897). The physical defect, defective vision, 8/200 right, is noted.

"2. Waiver of the above noted defect is authorized for limited service under the provisions of letter, this office dated January 7, 1942, file AG 210.31 (12-19-41) RP-A, subject: 'Waiving of physical defects for limited service officers of the supply arms and services.'

"3. Lieutenant Yasui will be retained in the Infantry Reserve with eligibility for limited service only.

"By command of Major General Benedict:

"W. R. MARTIN,

"Captain, A. G. D.,

"Asst. Adj. Gen."

Q. Have you ever been called to active service, Mr. Yasui?

A. No, sir, I have not been called to active service.

Q. And have you ever withdrawn your request to be assigned to active service?

A. No, sir, I have never withdrawn such request.

Q. And are you willing to go in active service at any time? A. I am, sir.

Q. Now, I notice that that letter is addressed to Hood River, in March, and the others have been to Chicago. When did you return to the West?

A. I returned to Portland on July 12, 1942.

Exhibit X—(Continued)
(Testimony of Minoru Yasui.)

Q. On when? [75]

A. July—January 12, 1942.

Q. And, with reference to that, when did you go up to the FBI office?

A. On the afternoon of my arrival here in Portland, Oregon.

Q. And what was your purpose in going to the FBI office?

A. I had several conversations with Mr. Splendor, who is the Special Agent of the Federal Bureau of Investigation at Chicago, and he had suggested that it would be a very wise thing for me to keep in touch with the Federal Bureau of Investigation agents and inform them of my removal from Chicago to the West Coast area.

Q. And it was for that reason that you went up there?

A. And incidentally to inquire about my father, whom I had not seen for the last two years.

Q. Now, you had a conversation with Mr. Mize, at which I believe Mr. Davis also was present at least during a part of the conversation. I don't know as there is very much difference between you as to what happened, but I wish you would state your version of that conversation.

A. In general, the conversation as reported by Mr. Mize is correct. We did discuss our school days, and then we went into whether or not the Army at the present time in moving the Japanese-

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

American citizens along with the enemy aliens was justified or not. Ray Mize posed the question that if I were the Commander in Chief of the Western Defense Area, knowing [76] that an imminent invasion was possible, how would I be absolutely sure that the security of this country would not be in danger. Well, the only logical answer would be to intern the Japanese. However, I asked the academic question, if Mize himself was God almighty how would he prevent wars, to be absolutely sure to prevent wars. Mize answered that he would destroy the people. Of course, that is the extreme view, but we did converse along those lines.

Q. Well, at that time do you know whether there had been any orders removing the American citizens?

A. At that time there was no such order.

Q. And this was a sort of an academic discussion?

A. It was a hypothetical question at the time, yes, sir.

Q. I believe Mr. Mize also said that you were sorry that you had taken the action that you had. I believe that was in a later conversation you had with him.

A. No, I believe that statement had been made at the time. The question was whether I believed any repercussions would happen from my testing the constitutionality of the curfew act, and I be-

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

lieved that possibly there would be repercussions that would be harmful to the Japanese colony.

Q. I was in error. Your conversation with Ray Mize was on April 3rd, I believe, and the one with Mr. Quinn was on January 12th.

A. As I recall, it was on March 30th. [77]

Q. Your recollection was that it was March 30th? A. Yes, sir.

Q. And what did you have in mind when you made that last statement?

A. Well, there is always a possibility of more stringent regulations being imposed, and, secondly, the public resentment against any one, possibly, testing the constitutionality of an Army order.

Q. Now, Dr. Everson and Mr. Scott testified as to your testimony up there at Missoula. You did appear at the time of your father's hearing before the Alien Board, did you? A. I did, sir.

Q. And what is your recollection as to what you told them about your activities?

A. Well, substantially, the testimony of Dr. Everson and Mr. Scott is correct. I did testify that I was employed at the Consulate General; I told them something of my family background and my education and what I did there in Chicago; also stated the fact that I was a reserve officer, and answered questions in general from the members of the Board.

Q. What is your recollection as to whether or

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

not you mentioned up there the fact that you had gotten letters of recommendation from Dr. Wayne Morse and others?

A. I didn't hear the question, sir.

Q. What is your recollection as to whether you told the Board that [78] you had also got letters of recommendation from Dean Morse and others?

A. I believe the statement was made that I did receive recommendations from the various deans and officials at the University of Oregon.

Q. Now, one of the witnesses, I believe Dr. Everson, also said that you said you later became public relations man on behalf of the Consul and that you made speeches which the Consul usually looked over and approved before you delivered them.

A. The testimony at the time of the hearing was brought out that I had no discretion in picking the exact subject or in picking the wording of the speeches.

Q. Well, was it a fact that these speeches were approved by the Consul General before—

A. (Interrupting) That is correct, sir.

Q. I see; and you so told the Board?

A. Yes, I did.

Q. Mr. Everson also mentioned that something was said by you about making speeches at Kankakee, some such place as that. Do you recall that place?

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

A. To the best of my knowledge, I have never been to Kankakee.

Q. Now, have you ever obtained or attempted to obtain naturalization in any foreign state whatsoever? A. No, sir, I have not.

Q. Have you ever taken an oath or made an affirmation or other [79] declaration of allegiance to a foreign state?

A. No, sir, I haven't made any such affirmation or oath.

Q. Have you ever entered into or served in the armed forces of a foreign state?

A. No, sir, I have not.

Q. Or have you ever offered so to do?

A. No, sir, I have not.

Q. Have you ever accepted or performed the duties of any office, post or employment under the government of a foreign state which only nationals of such state are eligible to perform?

A. No, sir, I have not.

Q. Have you ever voted in a political election in a foreign state? A. No, sir.

Q. Or participated in an election or plebiscite in determining the sovereignty over a foreign state? A. No, sir.

Q. Have you ever made a formal renunciation of nationality before a diplomatic or consular agent of the United States in a foreign state?

A. No, sir, I have not.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. Or have you made any renunciation of any kind of citizenship in the United States?

A. No, sir, I have never renounced American citizenship.

Q. Have you ever deserted the military or naval services of the [80] United States?

A. No, sir, I have not.

Q. In time of war or otherwise?

A. No, sir.

Q. Have you ever committed any act of treason or attempting by force to overthrow or bear arms against the United States? A. No, sir.

Q. Or have you ever been convicted of any such offense? A. No, sir.

Q. By a court martial or by a court of the civil jurisdiction? A. No, sir, I have not.

Q. And, as far as you know, have you ever, either intentionally or unintentionally, done any act to renounce citizenship in the United States of America?

A. To the best of my knowledge, I have never renounced my American citizenship.

Q. Or have you ever had any intention of so doing?

A. I have had no such intention.

Mr. Bernard: I think, your Honor, that is about all of it. If you are going to have a recess, I would like to check my notes.

The Court: The Court will take a recess.

Exhibit X—(Continued)
(Testimony of Minoru Yasui.)

(A short recess was thereupon had, after which proceedings were resumed as follows:)

The Court: Are you ready, Mr. Bernard? Are you ready to go ahead? [81]

Mr. Bernard: Yes.

Q. Mr. Yasui, I forgot to ask you whether or not you have ever taken an oath of allegiance to the United States of America?

A. Yes, I have taken an oath of allegiance to the United States of America in December, 1937, upon the completion of my R.O.T.C. course from the University of Oregon. It was necessarily postponed to December because I had not reached my majority until October.

Q. You completed it in October, but you had to wait until you were of age to take the oath?

A. I completed it in June.

Q. Now, at the time of your arrest on this charge what were you doing?

A. At the time of my arrest?

Q. Yes. I don't mean at the exact moment. I understand you were waiting to go into the Army, but were you doing any work in the meantime?

A. I was working here, employing myself as an attorney at law, in the practice of law, in Portland?

Q. And you were in actual practice at the time?

A. I was, sir.

Exhibit X—(Continued)**(Testimony of Minoru Yasui.)**

Q. Now, you have related your employment with the Consul General's office in Chicago. I will ask you whether you have had any employment or connection in any way, directly or indirectly, with the Japanese government except in that employment? [82]

A. No, sir, I have had no such other connection.

Q. Where are you residing now?

A. At the present time I am at the W.C.C.A. Assembly Center at North Portland, Oregon.

Q. That is where the Japanese are now being detained for twenty-four hours a day?

A. That is correct, sir.

Q. And do you know where your father's residence is?

A. I understand it to be at Camp Livingston, Louisiana.

Q. And where is your mother?

A. I believe in Pineville, California.

Q. Have you got some sisters?

A. Yes, sir, one sister, I believe now is in Denver, Colorado.

Q. She was younger than you?

A. Yes, sir. She just graduated at the University of Oregon.

Mr. Bernard: I think you may cross-examine.

Exhibit X—(Continued)
(Testimony of Minoru Yasui.)

Cross-Examination

By Mr. Donaugh:

Q. When did you graduate at the University of Oregon?

A. I graduated at the University of Oregon proper in 1937.

Q. And were admitted to the bar that year?

A. No, sir; then I was in the University of Oregon Law School and graduated in 1939.

Q. And when did you start to work for the Japanese Consul General in Chicago? [83]

A. During April, 1940, the year following my graduation.

Q. I see; and in the meantime I believe you said you had practiced law at Hood River?

A. For a short time.

Q. Do you speak Japanese? A. I do, sir.

Q. And where did you learn to speak Japanese?

A. I learned it from my parents.

Q. Do you speak Japanese in your home?

A. To a certain degree, yes, sir.

Q. Have you spoken Japanese for a good many years? A. Ever since I can recall.

Q. Ever go to a Japanese language school or Japanese school of any kind?

A. Yes, sir, for three years.

Q. Whereabouts was that?

A. At Hood River, Oregon.

Q. Whereabouts?

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

A. At Hood River, Oregon?

Q. At Hood River, Oregon. What was the name of that school?

A. I think they called it the Japanese language school.

Q. Japanese language school? A. Yes, sir.

Q. Is that a school where other Japanese young men and young women attended? [84]

A. Yes, sir.

Q. All Japanese students? A. Yes, sir.

Q. What was the practice up there in regard to Japanese children attending the school?

A. Well, there was a session of reading and then a session of writing, and then we reviewed what we had done in the mornings in the afternoons and Saturdays, and, well, it was just done in an attempt to teach us to read and write the Japanese language. It is very difficult and takes considerable study to master it.

Q. Was it attended pretty generally by the sons and daughters of Japanese families in Hood River?

A. Yes, fairly.

Q. Do you recall what years you attended?

A. Not exactly, no, but I was attending grammar school at the time. Probably, oh, about prior to 1930, about '26, '27, on up to about 1930. I don't recall exactly the years.

Q. Did you go to any other Japanese school except that one? A. No, sir, I did not.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. Did you have any Japanese societies or organizations which you attended in Hood River or elsewhere?

A. By Japanese societies what do you mean?

Q. Organizations or associations of Japanese people?

A. There is the Japanese Methodist church, of which my father [85] and mother are members, that I attended on Sundays; and the Japanese-American citizens League, composed of American citizens of Japanese ancestry; and that is about all the Japanese organizations that I have attended.

Q. Ever belong to any Japanese fencing clubs?

A. No, sir.

Q. Or riding clubs of any kind?

A. No, sir.

Q. Are you a member of the Methodist church?

A. I am, sir.

Q. You say you are? A. Yes, sir.

Q. Have you ever been a member of any other church? A. No, sir, I have not.

Q. In the Japanese language school what language is used there?

A. Both English and Japanese.

Q. Both English and Japanese; but you went there to learn and become proficient in Japanese, is that it?

A. To attempt to become proficient, yes.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. Is there a Japanese farmers' association in your community, your home community?

A. No, I think not, not in Hood River.

Q. You never belonged to it yourself?

A. I was too young at the time.

Q. And have never joined it since, since you have become older? [86] A. No, sir.

Q. How long after you went to work for the Japanese Consul General did you register with the Secretary of State in Washington, D. C.?

A. The registration was taken care of by the office. —The Consul General's did that for us as employees. As I recall, even the chauffeur of our office was registered with the Secretary of State.

Q. You had, however, had occasion to work there for a considerable period of time before your registration was filed?

A. Well, to the best of my knowledge, it should have been, if not, filed twice, because I signed two documents, once in '40 and once in '41.

Q. I see. The total period of your employment there was how long?

A. Approximately from April 1st until December 8th,—that is, April 1st of 1940 until December 8th of 1941.

Q. Now, I believe you stated on direct examination that the Japanese Consul General by whom you were employed was the former Japanese Consul in Portland? A. That is correct.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. Did I understand that correctly?

A. That is correct, sir.

Q. And what was his name?

A. His name was Hiroshi Asinu.

Q. And how long ago was he the Japanese Consul here in Portland?

A. I do not recall. I don't remember him directly. [87]

Q. You didn't know him directly?

A. No, sir.

Q. Then your contact with him was through whom? A. My father.

Q. Did your father and the Consul have any close contacts, so far as you know?

A. At what time are you speaking, sir?

Q. I am just asking you. You say your contact with the Japanese Consul General was through your father. A. Yes, sir.

Q. Had your father and the Consul General been associates over a long period of time?

A. Well, as I understand, the Hood River community has about five hundred Japanese, and every Consul here goes up to Hood River about once a year to contact various people, and my father through those contacts had undoubtedly met Mr. Asinu.

Q. And it was through that contact by your father with the Japanese Consul that the letter he wrote soliciting employment for you is what got you your position, is that it?

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

A. As I understand, that together with what I had achieved at the University of Oregon.

Q. Your father has been rather active in the Japanese colony in Hood River, hasn't he?

A. He has been very, very active in advancing the betterment of that community, yes, sir. [88]

Q. Contributed money to the Japanese war fund?

A. As to that I have no knowledge.

Q. Well, isn't it a fact that your father testified in your presence before the Alien Hearing Board that he had contributed money to the Japanese war fund?

Mr. Bernard: We will object to that, your Honor, on the ground that it is an attempt to do indirectly what they could not do directly. This young man would not be bound, under the circumstances there prevailing, by anything that his father said in that hearing.

The Court: No, I don't think it is binding. I will sustain the objection.

Mr. Donaugh: Q. Were you present at the ceremony in the Japanese Consul's office in Portland when your father was given a high honor by the Japanese government in 1940?

A. No, sir, I was not.

Q. You are aware of the fact that he received recognition by the Japanese government?

A. For the work that he had done in promoting

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

better relations between the Japanese and Americans in Hood River Valley, yes.

Q. How long ago did you say you returned to Japan?

A. Well, to the best of my recollection, after I returned to this country I became nine years old. That would make it in 1925.

Q. You went over there, then, when you were—

A. Eight and a half, approximately.

Q. Eight and a half. [89]

Q. You returned with your parents, with your father?

A. Yes, sir, my mother and my father went to Japan to visit their parents, or my grandparents.

Q. How long were you there?

A. Approximately three months, during the summer vacation.

Q. Did you go to school or engage in activities of your own there under the guidance of your parents while you were there?

A. No, sir; it was the summer vacation. We just went on a vacation to see the grandparents and to visit.

Q. Did you return there at any time?

A. No, sir.

Q. That is your only trip?

A. That is my only trip.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. Now, in regard to your work in Chicago, you had occasion to deliver speeches occasionally at the request of the Consul General?

A. That is correct, sir.

Q. How many of those public appearances would you say you made?

A. Well, I can't recall the exact number, but during the eighteen or twenty months I was there approximately once a month.

Q. And where would you receive your directions to deliver a speech at a certain time?

A. From the Consul General.

Q. From the Consul General?

A. Or the Acting Consul General.

Q. And I believe you testified a moment ago that you prepared [90] these talks but they were approved by the Consul General?

A. Yes, sir, the procedure was that he would suggest a particular topic and talk over the general outline of the speech, which I would put into English, submit it to him for approval, and if approved then I gave the speech itself.

Q. But you said that you had no discretion in what you did, is that it?

A. That is, I was under the direct supervision of the Consul General.

Q. In other words, you did and said what the Consul General wanted you to do?

A. Virtually, yes, sir.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. Well, now, when you went to work for the Japanese government, through the Japanese Consul General, you were aware, were you not, that conditions between Japan and the United States over a period of a number of years had caused considerable comment and difficulty in the exchange of messages, indicating the possibility of strained relations between this country and Japan? You knew of that, did you not? A. Yes, I did.

Q. Did you not know that even as far back as 1927—or '37, rather, that an American gunboat and American sailors had been fired on by the Japanese, and that that and a series of companion acts in China, in the International Settlement, where American citizens were involved, had caused a strained conditions between [91] those two countries?

A. Yes, I understood all those things and it was my purpose when I worked for the Consul General of Japan possibly to work for a better relationship. The letter from Dean Wayne L. Morse particularly pointed out that a person born in this country of Japanese parents might contribute not only to the peace of this country but the peace of the world by attempting to explain the position of Japan, to bring out economic conditions. It proved subsequently that we were wrong.

Q. But you testify that you had no discretion

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

in what you did, that you did what you were told to do by the Japanese Consul?

A. That is correct.

Q. And did not exercise your opinions as an American citizen, but did what the agent of the Japanese government asked you to do and said what he asked you to say?

A. That is correct, to bring out what the Japanese government has to say to the attention of the American people, to express it so it could be understood.

Q. And well knowing that the attitude of this Government and the American people was contrary to the policy of Japan that you were defending, speaking about?

A. Because, as I said before, I thought it was my contribution to the preservation of peace. As I admitted before, we were wrong, but that was my sincere purpose in working for the Consulate General of Japan. [92]

Q. When you spoke to Special Agent Mize and Special Agent Davis of the FBI and made the comment which has been referred to here and which I believe you testified to on direct examination, that under certain conditions the Japanese on the Pacific Coast should be interned, did you make any distinction in that between aliens and Japanese-Americans? What was your attitude that you expressed to Mr. Mize and Mr. Davis?

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

A. At that time the hypothetical question arose, how would we be absolutely sure, how would we absolutely protect the security of this country, in case of an invasion by Japan? In answer to a hypothetical question like that, of course, the obvious answer would be either to destroy or to intern all the Japanese and Japanese Americans, that is the only absolutely sure way, but that is purely a theoretical question.

Q. That is true; but your answer to the question was the internment of the Japanese, Japanese aliens or Japanese-Americans; that was the answer you gave them? In answer to the question, that is what you gave as your opinion?

A. That is correct, yes, as far as theory and logic is concerned.

Q. Now, you have indicated that you have had some regret by reason of possible repercussions by what you have done concerning your violation of the curfew hour. Has some resentment come to you on the part of Japanese in that connection?

A. No, sir, there has been no resentment. The only reason I feel that perhaps it is too bad is to be opposing something that the [93] Government does, because I feel that this is my government too, and it is then too bad to have to oppose the orders of our constituted authorities, but I feel in this particular case that it must be done.

Q. And have you had discussion with other

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Japanese out at the Assembly Center in North Portland on your action? A. Very few.

Q. What is the attitude of the people out there?

Mr. Bernard: I don't think that is material, your Honor. We object to it.

The Court: The objection is sustained.

Mr. Donaugh: Q. As a matter of fact, you have had very little discussion with Japanese out at the Center, have you?

Mr. Bernard: I object to that, also.

The Court: The objection is sustained.

Mr. Donaugh: Q. How many times have you contacted by telegram or letter officials of the Army concerning going into the service since you have returned to Oregon?

A. Since I have returned to Oregon?

Q. Yes.

A. On December 19th I was requested to report for active—for a physical examination. On the 19th I was at Vancouver. Subsequent to that I called at the office of—I don't recall the exact date, but sometime in January—to see if any list had been compiled whereby I would have to go into immediate [94] active service. At that time they could not inform me. I think I notified them of my change in address from Chicago to Hood River, Oregon, and that, I think, is about the sum of my contact with the Second Military Headquarters.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. But you have not been called for active service, have you? A. No, sir, I have not.

Q. You testified, as I recall, on direct examination to certain other employees employed in the Japanese Consul General's office in Chicago. How many employees were in that office, in round numbers?

A. In March, or, rather, April of 1940 there were approximately ten? Q. Sir?

A. Approximately ten in 1940.

Q. Approximately ten; and of those you and, I believe, the young lady you spoke of—

A. (Interrupting) Yes, sir.

Q. (Continuing) —were the American citizens in the office?

A. No, sir, there were four American citizens.

Q. Four American citizens. Isn't it a fact that speeches that you delivered there were in justification and defense of the Japanese war policy?

A. Rather than that, it was an attempt to show the economic differences that existed between China and Japan, to try to point out whereby those differences could be resolved. I have [95] never advocated war between Japan and the Chinese. As a matter of fact, I don't think any responsible Japanese ever has. Those are some of the speeches that I did make. On the other hand, I did make speeches before the University of Chicago, some group there, concerning the flower arrangements,—

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Mr. Bernard: (Interrupting) A little louder. I didn't hear you.

A. (Continuing) —Down at Brent House, concerning the history of the Japanese Empire. Various speeches of that nature I did make, yes.

Mr. Donaugh: Q. Now, during the course of your employment there, acting under the direction of the Japanese Consul General, Japan and China were continuously at war. It wasn't a question of you or anyone else advocating war on Japan. War existed. Now, isn't it a fact that your talks and the subjects of your talks were in justification of the Japanese war and attacks on China?

A. Well, practically, there was a war existing. In legal theory no war existed. However, the point that I was bringing out, that probably the differences between China and Japan could be resolved without resort to arms. I have never condoned the military activities of Japan, but attempted to bring about an understanding to the American people that perhaps there is some economic basis for such a war.

Mr. Donaugh: I believe that is all. [96]

Redirect Examination

By Mr. Bernard:

Q. Just one or two questions, Mr. Yasui. About your registration in Washington, D. C.,—do you know whether the other employees at the office were also registered?

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

A. Well, according to the Consul General, yea, they were. The Consulate General staff took care of our registration for us.

Q. And was your registration taken care of by the Consul General?

A. That is correct, sir. We signed the documents and they were sent in by—I believe submitted by the Embassy at Washington.

Q. This Japanese school, did you attend that while you were also attending the American schools, public schools? A. Yes, sir, I did.

Q. When would you attend the Japanese schools?

A. Generally we would attend Friday afternoon after the American schools, and then on Saturday mornings.

Q. Now, he asked if your father hadn't been active in the Japanese colony there. Do you know whether your father was very active among the white people in Hood River?

A. He was very active among the white people, yes, sir.

Q. In what connection?

A. He was a member of the Rotary Club. He was also a Director of the Apple Growers' Association, which is the biggest fruit cooperative in that particular region. He also attempted to bring about a better feeling among that community. As you [97] recall, in Hood River there was quite a

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

bit of anti-Japanese feeling earlier, approximately in 1906 and thereabouts. Well, through the efforts of my father and the efforts of people like him the community there settled down to a normal, peaceable community, whereby the Japanese and the American farmers cooperated together in marketing their products and bringing themselves mutual return.

Q. Now, you have testified that you made speeches and took your orders from the Consul General. I will ask you whether or not you were ever asked —strike out “asked”—whether you ever made a speech or did anything which you considered detrimental to the United States of America?

A. No, sir, I have never done such a thing. I couldn't have done such a thing.

Q. And were you ever asked so to do while you were there employed? A. No, sir, I was not.

Mr. Bernard: I think that is all.

The Court: Just a moment.

Mr. Bernard: I think, to complete the record, your Honor, during the cross-examination of one of the Government's witnesses I had identified the card which we showed the witness, and I will ask that that be introduced in evidence. I think it is Exhibit Number 2.

Mr. Donaugh: Exhibit Number 1.

Mr. Bernad: Exhibit Number 1. [CS]

The Court: Admitted in evidence.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

(The card referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Defendant's Exhibit 1.)

The Court: Are you through?

Mr. Bernard: Yes, I am.

Recross Examination

By Mr. Donaugh:

Q. Just one question: Isn't it a matter of fact that there has been considerable anti-Japanese feeling in Hood River since December 7th?

A. As to that I am in no position to answer, because I have not been continuously a resident of Hood River since December 7th. I arrived in Portland on January 12th, 1942, returned home probably for two or three days, and for the most part I was here in Portland practicing law, so I don't know definitely the position of the American public in Hood River.

Q. As a matter of fact, you have spent considerable time at Hood River, haven't you, since you returned to Portland—since you returned to Oregon?

A. Considerable time? By that you mean how long?

Q. I mean ample time for you to have the opportunity of knowing Japanese sentiment on the part of Americans or anyone else.

A. I know that the people that understand the

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Japanese-Americans, [99] who know that they are good American people, have always said that they would expect us to do our part. My brother was the chairman of the bond drive to buy Liberty—or Defense Bonds and Stamps. They have the confidence of the people, in my opinion.

Mr. Donaugh: That is all.

Mr. Bernard: That is all.

The Court: May I—

Mr. Bernard: Yes.

The Court: Just a moment. I am going to submit this to you, Mr. Bernard: I should like to ask some questions, but I will not insist upon it over objections.

Mr. Bernard: Well, under the peculiar facts of this case, I will be glad to have the witness answer any question your Honor wants to ask him. I would prefer it that way, and I know he would.

The Court: Do you know of one Matsuoko?

A. Yes, sir.

The Court: Who was he?

A. He was an ex-Foreign Minister of Japan.

The Court: And a graduate of the University of Oregon?

A. That is correct, as I understand, sir.

The Court: Do you know him personally?

A. No, sir, I do not.

The Court: You have read, during these years and since you [100] became associated with the

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Consulate General of Japan in Chicago, concerning the attitude that he has taken regarding American-Japanese relations?

A. Well, I have heard a great number of stories, and I haven't believed some of them. Some of them I have believed, yes.

The Court: A good deal of publicity has been given to his views.

A. Yes, sir, there have.

The Court: And are they not definitely anti-American?

A. Well, I believe it is hard to so believe whether he is actually anti-American. I think that he is more pro-Japanese than anti-American.

The Court: You say you don't know him personally?

A. No, sir, I do not. You see, he graduated—

The Court: (Interrupting) Did your father know him?

A. I doubt it.

The Court: You knew of those utterances, however, before you accepted this position, did you?

A. Yes, sir, I did.

The Court: What is Shinto?

A. Shinto? As I understand, Shinto is the national religion of Japan.

The Court: Do you give adherence to its precepts?

A. My father and mother were Methodists in

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Japan, and I myself have been a Methodist in this country and I don't know the [101] precepts of the Shinto religion.

The Court: Was not Shinto practiced in your household?

A. No, sir.

The Court: By your father and mother?

A. It was not, no, sir.

The Court: That includes some of the phases of ancestor worship, does it not? You know enough about it to know that.

A. Yes, if I understand it, that is so.

The Court: Does the Emperor of Japan have a religious capacity?

A. Well, I am not really versed enough to state definitely, but I understand that he has, yes.

The Court: And do you give adherence to that belief?

A. I do not. To me he is a human being.

The Court: And you do not accept divine pretensions on the part of the Emperor of Japan?

A. No, sir, I do not.

The Court: Nor the belief of the Japanese people to that effect?

A. No, sir, I do not.

The Court: Were offerings ever made in the graveyard or before the grave of any of the people of your family?

A. Offerings? Floral offerings, yes, on Memorial Day and on Sundays.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

The Court: Were there not food offerings placed?

A. There were no food offerings placed. Both my father and mother [102] are good, devout Methodists. They are really Christians.

The Court: Do you believe in the sanctity of an oath?

A. I do, sir.

The Court: As administered in this court?

A. I do, sir.

The Court: Have you accepted an oath of allegiance to the United States?

A. I did.

The Court: And on that occasion did you accept some other obligations?

A. To preserve and defend the Constitution of the United States, yes.

The Court: And—Do you remember the rest of that oath?

A. No, sir, I do not.

The Court: And to obey—do you remember that part of it—to obey the orders—

A. (Interrupting) Yes, sir.

The Court: Under certain circumstances?

A. Yes, sir.

The Court: Can you repeat that part of it?

A. I cannot repeat it.

The Court: Do you know the substance of it?

A. In substance it is to obey the commands of

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

the commanding officer upon proper authority in time of active service, or something to that effect. [103]

The Court: Do you remember anything about the President of the United States, the orders of the President of the United States?

A. Vaguely, yes, sir.

The Court: You still hold a commission as a reserve officer in the Army of the United States?

A. I do.

The Court: Do you still think that is in effect?

A. I believe so.

The Court: You haven't resigned it?

A. No, sir.

The Court: So far as you know, it has not been cancelled?

A. So far as I know, it has not been cancelled.

The Court: Is there any obligation on you, under those circumstances, to obey an order of the Commanding General of the Western Command or of the President of the United States as Commander-in-Chief of the Armies of the United States?

A. Yes, I believe that there is a certain obligation as an American citizen to respect the Constitution of the United States.

The Court: I am not speaking of your obligation as an American citizen. I am speaking of your obligation as a reserve officer in the Army of the United States.

Exhibit X—(Continued)
(Testimony of Minoru Yasui.)

A. At the time of my active commission, active service, I will obey any command or order of my commanding officer.

The Court: You don't think that your oath you have taken [104] in accepting a reserve commission doesn't require you to obey any order of the Commander-in-Chief of the Armies of the United States until he calls you to active service?

A. As a private citizen—

The Court: I am not talking about your obligation as a private citizen. I am talking about your obligation as a reserve officer of the United States Army.

A. Well, as a reserve officer, yes.

The Court: What are the obligations?

A. To hold myself in readiness for active service at any time; to obey the Constitution of the United States and the laws of the United States.

The Court: And you thought there was no special obligation on you to obey this particular order?

A. Yes, I took that into consideration, but I feel that, after all, this country is dedicated to the proposition that all men are created equal, that every American citizen has a right to walk up and down the streets as a free man, and I felt that these regulations were not constitutional.

The Court: If as a Second Lieutenant on active duty you had been given the same order by the

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Commanding General of the Western Department
would you have obeyed it?

A. I would have, sir.

The Court: And what distinction do you make now?

A. Because I am now, at the present time, a civilian. [105]

The Court: Notwithstanding you hold a reserve officer's commission?

A. That is correct, sir.

The Court: And in the event that you were on active duty would you then think that it was proper to by indirection disobey such a command by invoking other people Japanese people, to test the constitutionality of this as a law?

A. You say if I were in active service?

The Court: Yes.

A. No, I would not, because at that time, if I were in active service, I would obey the command of my commanding officer, wherever he sent me.

The Court: No matter where he sent you?

A. Yes.

The Court: And even though they were not directly expressed?

A. Yes, sir.

The Court: And yet you think you had no obligation in that regard, because you had not been ordered to active service?

A. In regard to my personal self, yes, that is correct.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

The Court: Isn't there also a regulation to the effect that no reserve officer of the United States shall leave the American continent of the United States without registering with the War Department, whether on active duty or not?

A. As to that I am not positive. I believe that there is some similar regulation. [106]

The Court: Would you obey that order?

A. I believe I would, sir.

The Court: Why?

A. Because, after all, it pertains to a person-on active service, directly so.

The Court: Would you also construe the oath of allegiance to allow you to disobey an order, any order, that is incumbent upon an American citizen?

A. I didn't understand.

The Court: I say, would you also construe the oath of allegiance so that you could disobey an order binding on other American citizens?

A. No, sir, I could not.

The Court: I think that is the extent of my examination. Do you have any further questions?

(Witness excused.)

Mr. Bernard: The defendant will rest his case, your Honor.

(Defendant rests.) [107]

Exhibit X—(Continued)

Rebuttal Testimony.

Mr. Burdell: Mr. Goetze.

GERHARD GOETZE

was thereupon produced as a witness in rebuttal and was examined and testified as follows:

The Clerk: State your name, please.

A. Gerhard Goetze, (spelling) G-e-r-h-a-r-d G-o-e-t-z-e.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Burdell:

Q. Mr. Goetze, is that it? A. Goetze.

Q. What is the nature of your employment, Mr. Goetze?

A. I am Secretary and Business Agent of the Lumber & Sawmill Workers Local 3.

Q. And what is the jurisdiction of that union?

A. All the sawmills that are organized under the Local in the City of Portland.

Q. And the members of the union are engaged in what business, Mr. Goetze?

A. Lumber manufacturing.

Q. Does that union include all laborers in this area who are engaged in working in lumber mills and lumber plants?

A. Some of them are not, there are some of them that are not organized under our Local, but all the larger mills. [108]

Exhibit X—(Continued)

(Testimony of Gerhard Goetze.)

Q. How many members are there in the union?

A. About twenty-two hundred.

Q. About how many?

A. Twenty two hundred.

Q. Now, Mr. Goetze, acting in your official capacity, have you at any time recently been asked to settle certain disputes which arose among the laborers and their employers concerning the employment of Japanese?

A. Well, there was no dispute between the employers and the working men. The dispute was just amongst the men themselves.

Q. And did you have any part in settling that dispute or carrying on negotiations with respect to it?

Mr. Bernard: I would like to object to this line of interrogation, your Honor, as being wholly immaterial to any issue in this case and as not being proper rebuttal testimony.

The Court: I don't see the purpose of it, Mr. Burdell.

Mr. Burdell: Well, if the Court please, as I understood some of the testimony introduced by the defendant, it seemed to be directed to some showing that the particular order which is here challenged was an unreasonable order, and it seemed to me to be directed toward overcoming the presumption that exists that all legislation and orders passed executed pursuant to the power granted under the Constitution are reasonable. Such a pre-

Exhibit X—(Continued)

(Testimony of Gerhard Goetze.)

umption does exist. Now, as I understood the testimony of the defendant, some of it, at least, was directed to a rebuttal of [109] that presumption, and I am attempting to rebut the rebuttal in this manner, by showing that the regulation, that is, Public Proclamation 3, was reasonable.

The Court: What do you say to that?

Mr. Bernard: Well, my position is this, your Honor, that I do not concede that the fact that there have been some labor troubles between white people and Japanese would affect the question one way or the other as to whether or not the Government has a right to discriminate against Japanese citizens entirely because of their race. The obvious answer would be if those Japanese had been engaged in doing anything wrong there were means to prosecute them, and how the fact that there might have been some isolated labor trouble in some locality between Japanese and white people should justify a discrimination against my client, who was not a party to that, solely on the ground of his ancestry, we object to as wholly immaterial to any issue in the case.

Mr. Burdell: If the Court please, in the first place, I can and will show that those disputes such as I am attempting to offer evidence concerning were not isolated, I can show that they were so widespread that they threatened to affect the entire economy of the Northwest, for that matter, the

Exhibit X—(Continued)

(Testimony of Gerhard Goetze.)

Pacific Coast, that they were so widespread that they threatened to affect the very war production effort. Now, counsel in his statement to the Court just now assumed that this discrimination, or this classification, [110] was based solely on race. I will propose to show, if the Court please, that the classification is not based on race, but in fact is based on certain circumstances, conditions, acts and happenings, that they occurred as a result of the existence of a race differential rather than being based on race in the abstract. In other words, if the Court please, this classification that has been exerted in this case is not a classification based upon race, as it was in the Buchanan vs. Worley case, where there was a discrimination between Whites and Blacks; it is not a discrimination based on color alone. The classification in this case, if the Court please, is based on all these many facts, happenings and occurrences that have existed here in the past few months that have arisen as a result of distinction, the race distinction, between Japanese and Americans, not on a race alone, but upon many things that occurred and many acts that may occur as a result of that race discrimination. Now, we propose to show that prior to the time of the issuance of Executive Order 9066, when President Roosevelt vested power in the Commanding General of the Western Defense Command to issue certain regulations regarding the conduct of Japa-

Exhibit X—(Continued)

(Testimony of Gerhard Goetze.)

nese citizens and aliens, prior to that time there were threats of riot, even, in our vital industries which threatened to affect and destroy and hamper and destroy the entire war economy and the very war effort which is taking place in this vital area at this most critical time, and it was only after the issuance of certain regulations, and only [111] after Lieutenant General DeWitt had declared that he intended to promulgate certain regulations, that the danger and the imminence of these troubles and these disputes and these riots were overcome. My thought is, if the Court please, that this is not a discrimination against the Japanese people any more than it is a discrimination for them. I think that the mere fact, your Honor, that this is only the second, I believe, or possibly the third, case of this sort on the entire Pacific Coast, where there are thousands and thousands of Japanese citizens, evidences the fact that the Japanese people themselves realize that their own safety demands that there be a certain type of regulation, of restriction of this nature, and that is what I propose to show, that their own safety does demand that type of thing,—not only their own safety, but the safety and efficiency of our own war production efforts.

Mr. Bernard: If your Honor pleases this is the first time we ever heard that advocated as an argument for the violation of the due process of law clause of the Constitution, if it is a violation, that

Exhibit X—(Continued)**(Testimony of Gerhard Goetze.)**

that violation would be justified because in the opinion of the Government the defendant would be benefited by it. Now, I say this is a regulation based entirely upon color and race; it is so on the very terms. If this regulation had provided that Japanese citizens who had been engaged in any trouble, that he proposes to develop by this witness, or had classified the citizens who had done things that were inimical [112] to the welfare of the Government, that might be one thing, but this regulation proposes to and does in fact apply against Japanese citizens entirely because of their race and not because of anything that any one of them has done, and for that reason we have objected to the testimony.

The Court: I will sustain the objection.

Mr. Burdell: That is all, Mr. Goetze.

(Witness excused.)

Mr. Donaugh: May it please the Court, I desire to advise your Honor of the availability of a man who is familiar, by reason of long residence and contact, with the Orient, and in particular the Japanese people, a distinguished scholar, educator, who is available to testify as to the result of his contacts and investigations and long years of study of the Japanese, both alien and American-born, with the Japanese as a race of people and their ideals and culture and their type of loyalty, and their type of loyalty under circumstances such as

Exhibit X—(Continued)

the present conditions of war between Japan and the United States. Now, this man is here as an expert, in our opinion, and, in view of the nature of this case, before the Government closes its case I desire to inform the Court of the availability of this man should he have testimony which the Court will wish to hear.

Mr. Bernard: Well, your Honor, if this man has any evidence against my client, of course I can't object to it, but I certainly am going to object to any testimony or dissertation by [113] some man as to his conclusions as to what some of the Japanese might do under certain conditions. In the final analysis, it is not a subject of expert testimony at all, and I would, therefore, object to it unless—if he has any evidence against my client I have no objection to it.

The Court: Well, I think this might have been better used on cross-examination. Since it has not been used, why, I will exclude the general offer. I can't, of course, tell from this general offer what the specific matters are to be proved, and I will say that if it is just general like that, why, I have no interest in hearing it. If you wish to produce this man and ask him some questions, why, put him on the stand and I will rule on the questions as they come up.

Mr. Donaugh: Well, obviously, your Honor, the witness that we would present has no acquaintance whatever with the defendant in this case. His testi-

Exhibit X—(Continued)

mony would deal with the Japanese and their attitude, the basis of race culture, religion, both here in America and in Japan, on the basis of his experience, and it would only be on that basis that we could present him to you, and I only advise the Court of his presence here should his testimony be of interest to your Honor.

The Court: I might say that I have no interest in this matter at all. You call him as a witness, if you want to, and put him on the stand and ask him whatever questions you want to, and if the other side wants to object, why, the Court [114] will rule.

Mr. Donaugh: The Government rests, your Honor.

(Government rests.)

Mr. Bernard: At this time, your Honor, the defendant wishes to interpose a motion for a mandatory verdict or judgment of not guilty in this case, on the ground, first, that the indictment fails to state a charge, inasmuch as it is alleged in the indictment that the defendant was born at Hood River, Oregon, in 1916, and there is a presumption from the fact of birth that citizenship follows.

Second, that the evidence is conclusive and without dispute that defendant since his birth, and particularly at the time alleged in the indictment that these acts were committed, has been and is a citizen of the United States, and as such these regulations are void as to him, for the reason that they deprive

Exhibit X—(Continued)

him of his liberty and his property without due process of law.

Mr. Burdell: If the Court please, I know that your Honor is familiar with the rule that due process of law does not preclude a reasonable classification. I won't burden you with any discussion at length. The Supreme Court in a recent case—

The Court: (Interrupting) I don't want to hear any argument at this moment. I will consider it—Are you going to argue the case?

Mr. Burdell: I could, your Honor. I was about to.

The Court: Well, it is ten minutes to five, and I don't think [115] I will launch into the argument this afternoon. I have these gentlemen whom I have requested to be present, and—

Mr. Burdell: (Interrupting) I would like to take more than ten minutes.

The Court: I assumed so. I would suggest that inasmuch as the question is pretty involved you had better include the other grounds of your motion, and that is that it deprives him of equal protection of the law. That is the other phase of it.

Mr. Bernard: Well, I will. I am glad your Honor called that to my attention. I will add to the motion that, in addition to the ground that the regulations violate the due process of law provisions of the Fifth Amendment, the regulation is discriminatory in that it applies to Japanese-American citizens, or citizens of Japanese ancestry, and to no

Exhibit X—(Continued)

other citizens, and does not apply to citizens of Italian ancestry or citizens of German ancestry, and that the regulation is discriminatory and deprives the defendant of the equal protection of the laws which he is entitled to enjoy as an American citizen.

The Court: I think that I shall stop the proceedings this evening, and I am willing to hear from everyone as to when we shall argue the case, now. I will be here tomorrow; I will be here part of the time Monday, although I don't know how much of my time will be available then; I will be here again on Thursday for holding of naturalization proceedings, but other than that I will not be back until the following Monday. I am [116] going to Pendleton to try cases there, but I will fly down for the naturalization proceedings on Thursday.

Mr. Bernard: I might state, as far as my own condition is concerned, your Honor, I have had a case carried along in the Circuit Court which was supposed to go out a couple of days ago and which I felt might drag over today, and so I had an understanding that it would be assigned out tonight to be heard Monday, and, just considering my own preference, I would prefer to argue the case when you are here Thursday or at some later date. Now, that is my own preference in the matter.

The Court: The Government?

Mr. Burdell: That is satisfactory, your Honor. Is it your Honor's desire, or does your Honor have

Exhibit X—(Continued)

any interest in the matter, that the matter be argued by the Government before the submission of briefs by the amici curiae, or would you prefer that it be done after the submission of all briefs?

The Court: Well, I have had no feeling about it. Since I have asked these gentlemen to be present, I will consult their own convenience about when they want to bring in their briefs or if they want to make any argument orally or otherwise.

Mr. Burdell: Well, next Thursday is satisfactory, your Honor, to the Government.

Mr. Spencer: If your Honor please, I think I can speak on behalf of counsel who have been appointed in saying for all of them, I think, that our judgment, perhaps, is that we could [117] best serve by filing briefs at a proper time. In the preliminary discussion that we had the other day there was no suggestion that we participate in the argument. In fact, we did not understand that that was expected of us.

The Court: It is not expected of you. I just—

Mr. Spenceer: Well, I rather think that whatever service we render could be best rendered in the form of briefs, and at the time I don't know that I am prepared to voice my feelings.

Mr. Solomon: May it please the Court, at the preliminary meeting that we had it was indicated that your Honor desired that we submit those briefs prior to July 13th. At the time of that meeting we were under the impression that we would submit the briefs at this time, but we were notified

Exhibit X—(Continued)

at that time that no briefs would be asked before July 13th, the date upon which your Honor was going to return to Portland. Mr. Green, who was here this morning, his final words were, "Get as much time as you can."

The Court: That is a remarkable suggestion. Just in order to clarify the situation, I think that that must be a misunderstanding. I made no such suggestion as to July 13th.

Mr. Kester: May it please the Court, I think I can explain. The statement was made that your Honor set a number of things over that same morning for the 13th with the understanding that you would be out of the city and not be back and in a position to handle matters until then, and it was thought that probably [118] that date would be in accordance with your Honor's wishes.

Mr. Morris: If the Court please, as I understand, the present question is whether the arguments should be before or after we make our briefs, and I know that any effort that I make by Thursday would not be of value. I don't think I can be ready by Thursday.

The Court: Well, I think that what we will do is go ahead with argument on Thursday, both by the Government and by the defense, and then I will not set any time for briefs by those who are here. They may file briefs at such time as they choose, and the Court will have to give some time on those in any event. I will not give any direction to you, but any-

Exhibit X—(Continued)

thing that you feel that you can give the Court any light and service on I will appreciate your bringing in a brief. I think there are questions that have developed that I had not at all anticipated in the course of the trial of the case. There is one question that has been in my mind, and that is the question of whether the intention of a person possessed of dual citizenship, although not expressed in acts, is sufficient to permit a claim of allegiance of one type of citizenship or the other, whether the existence of an intention that the Court might find would be conclusive, or overt acts which tended to show that he claimed the other citizenship, if the Court thought the overt acts were not in good faith, and, of course the question of fact as to what the intention of the defendant actually was upon the attainment of majority. I think [119] I may say on that question that the Court as trier of the facts is not precluded from a finding of intention to accept Japanese citizenship simply because the defendant has testified that he had no such intent. I just suggest those considerations to you, gentlemen.

If there is nothing further, Court is now in adjournment until tomorrow morning at ten o'clock.

(Whereupon, at 4:58 o'clock p. m., Friday, June 12th, 1942, the oral testimony and proceedings at the trial of the above entitled cause were concluded, the Court taking an adjournment until 10:00 o'clock a. m., Saturday, June 13, 1942.) [120]

[Title of District Court and Cause.]

**CERTIFICATE OF REPORTER TO
TRANSCRIPT OF TESTIMONY**

I, Cloyd D. Rauch, hereby certify that on Friday, June 12, 1942, I reported in shorthand the oral proceedings and testimony had at the trial of the above entitled cause, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, pages numbered 1 to 120, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said date as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this 16th day of June, A. D. 1942.

CLOYD D. RAUCH,
Reporter.

[Endorsed]: Lodged in Clerk's office Dec. 15, 1942. G. H. Marsh, Clerk. By R. DeMott, Dep.

[Endorsed]: U. S. District Court, District of Oregon. Filed Jan. 5, 1943. G. M. Marsh, Clerk.

[121]

—
[Title of District Court and Cause.]**NOTICE OF APPEAL**

The name and address of appellant is, Minoru Yasui, Hood River, Oregon.

The name and address of appellant's attorneys is, E. F. Bernard, and Collier, Collier & Bernard, 1220 Spalding Building, Portland, Oregon.

The offense of which defendant was convicted is a Violation of Public Proclamation No. 3 of the Western Defense Command, and Public Law No. 503, 77th Congress, approved March 21, 1942.

The date of the judgment of conviction is November 18, 1942.

A brief description of the judgment or sentence imposed on defendant and from which he appeals, is to the effect that defendant be imprisoned for one year in such place as the Attorney General may designate, and pay a fine of Five Thousand (\$5000.00) Dollars, and stand committed until such fine is paid.

The name of the prison where defendant is now confined is Multnomah County Jail, Portland, Multnomah County, Oregon, the place of imprisonment under said sentence having not been designated by the Attorney General.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the 9th Circuit, from the judgment above mentioned on the grounds set forth below.

MINORU YASUI,
Appellant

Dated this 20th day of November, 1942.

The grounds of this Appeal are:

First: The Court erred in not sustaining defendant's demurrer to the indictment herein.

Second: The Court erred in over-ruling defendant's motion for a directed verdict of acquittal made immediately after all the evidence herein was introduced.

Third: The Court erred in finding and holding that the defendant was a citizen of Japan and in not holding that he was a citizen of the United States.

Fourth: The Court erred in imposing against defendant the sentence herein described or any sentence.

Due and legal service of the foregoing Notice of Appeal is hereby accepted and admitted in Portland, Multnomah County, Oregon, this 20th day of November, 1942.

CARL C. DONAUGH

United States Attorney

[Endorsed]: Filed Nov. 20, 1942.

District Court of the United States for the
District of Oregon

C-16056

UNITED STATES OF AMERICA

vs.

MINORU YASUI

1. Indictment for violation of Public Proclamation No. 3 of the Western Defense Command Act approved March 21, 1942, filed April 22, 1942.
2. Arraignment, May 4, 1942.
3. Plea to Indictment, Not Guilty, May 4, 1942.
5. Trial by Court, June 12th and June 18th, 1942.
6. Finding of guilty, November 16, 1942.
7. Judgment, one year imprisonment and \$5,000.00 fine, November 18, 1942.
8. Notice of Appeal filed November 20, 1942.

November 20, 1942.

Attest:

G. H. MARSH

Clerk

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

The defendant, in connection with his appeal, makes the following assignments of error which he avers occurred upon the trial of the cause:

1. The court erred in overruling the defendant's motion for a directed verdict of not guilty and for a verdict and judgment of not guilty for the reason and upon the ground that the defendant is and at all times has been a citizen of the United States of America and because the regulations which he is charged with having violated are void as to citizens of the United States of America and void as to citizens of the United States of America of Japanese ancestry and particularly the defendant in that they deprive such citizens and the defendant of life, liberty and property without due process of law and in that the regulations are discriminatory in contravention of the Fifth Amendment to the Constitution of the United States of America and for the further reason and upon the further ground that the indictment does not charge that the defendant is an alien but alleges facts from which it appears that he is and at all times has been a citizen of the United States of America.

2. The court erred in finding that the defendant is not a citizen of the United States of America for the reason and upon the ground that the evidence in the case is beyond dispute that the defendant is and at all times has been a citizen of the United States of America and for the further reason and upon the further ground that the indictment does not charge that the defendant is an alien but alleges facts from which it appears that he is a citizen of the United States.

3. The court erred in finding that the defendant was a citizen of Japan for the reason and upon the ground that there is no evidence in the case upon which such a finding can be based and for the further reason that the indictment does not charge that the defendant is a citizen of Japan or an alien but alleges facts from which it appears that the defendant is and at all times has been a citizen of the United States of America.

4. The court erred in not finding that the defendant is and at the time of the commission of the acts charged in the indictment was and at all other times was a citizen of the United States of America, for the reason and upon the ground that the evidence is beyond dispute that the defendant has at all times been a citizen of the United States of America and for the further reason and upon the further ground that there is no evidence that the defendant has ever been a citizen of any country other than the United States of America and for the further reason and upon the further ground that the indictment alleges that the defendant is a citizen of the United States of America.

5. The court erred in overruling the defendant's objection to the imposing of any sentence against him for the reason and upon the ground that the indictment in the case does not charge that the defendant is or was an alien but alleges facts suf-

ficient to show that the defendant at all times has been a citizen of the United States of America.

COLLIER, COLLIER &

BERNARD

Attorneys for Defendant

State of Oregon

County of Multnomah—ss.

Due service of the within Assignments of Error is hereby accepted in Multnomah County, Oregon, this 15th day of December, 1942, by receiving a copy thereof duly certified as such by E. F. Bernard, of Attorneys for the Defendant.

CARL C. DONAUGH

Of Attorneys for Defendant

[Endorsed]: Filed Dec. 15, 1942.

[Endorsed]: No. 10317. United States Circuit Court of Appeals for the Ninth Circuit. Minoru Yasui, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed January 11, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

**United States Circuit Court of Appeals
for the Ninth Circuit**

No. 10317

MINORU YASUI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL

The appellant files this statement of the points on which he intends to rely on the appeal:

1. The indictment does not state an offense in that the laws and regulations which the defendant is charged with violating are void because they deprive him of his liberty and property without due process of law.

2. The indictment does not charge a crime in that it fails to allege that the defendant is an alien but, on the contrary, alleges facts showing that the defendant is, and at all times has been, a citizen of the United States of America.

3. The indictment does not allege a crime inasmuch as the laws and regulations which the defendant is charged with violating deprive American citizens of Japanese ancestry and particularly the defendant of liberty and property without due process of law, and in that they deny American

citizens of Japanese ancestry and particularly the defendant the equal protection of the laws.

4. The court erred in overruling the defendant's motion for a directed verdict of not guilty and for a verdict and judgment of not guilty for the reason and upon the ground that the defendant is and at all times has been a citizen of the United States of America and because the regulations which he is charged with having violated are void as to citizens of the United States of America and void as to citizens of the United States of America of Japanese ancestry and particularly the defendant in that they deprive such citizens and the defendant of life, liberty and property without due process of law and in that the regulations are discriminatory in contravention of the Fifth Amendment to the Constitution of the United States of America and for the further reason and upon the further ground that the indictment does not charge that the defendant is an alien but alleges facts from which it appears that he is and at all times has been a citizen of the United States of America.

5. The court erred in finding that the defendant is not a citizen of the United States of America for the reason and upon the ground that the evidence in the case is beyond dispute that the defendant is and at all times has been a citizen of the United States of America and for the further reason and upon the further ground that the indictment does not charge that the defendant is an alien but alleges facts from which it appears that he is a citizen of the United States.

6. The court erred in finding that the defendant was a citizen of Japan for the reason and upon the ground that there is no evidence in the case upon which such a finding can be based and for the further reason that the indictment does not charge that the defendant is a citizen of Japan or an alien, but alleges facts from which it appears that the defendant is and at all times has been a citizen of the United States of America.

7. The court erred in not finding that the defendant is and at the time of the commission of the acts charged in the indictment was and at all other times was a citizen of the United States of America, for the reason and upon the ground that the evidence is beyond dispute that the defendant has at all times been a citizen of the United States of America and for the further reason and upon the further ground that the defendant has ever been a citizen of any country other than the United States of America and for the further reason and upon the further ground that the indictment alleges that the defendant is a citizen of the United States of America.

8. The court erred in overruling the defendant's objection to the imposing of any sentence against him for the reason and upon the ground that the indictment in the case does not charge that the defendant is or was an alien but alleges facts sufficient to show that the defendant at all times has been a citizen of the United States of America, and for the further reason that the laws and regula-

tions which the defendant is charged with violating are void because they deprive him of liberty and property without due process of law.

The appellant designates that the entire record be printed including the Bill of Exceptions, and the transcript of the evidence made a part thereof.

E. F. BERNARD

Of Counsel for Appellant.

Service of the foregoing Statement and designation on this 18th day of January, 1943, is hereby admitted.

J. MASON DILLARD

United States Attorney

[Endorsed]: Filed Jan. 20, 1942.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1942

No. 871

ORDER—April 5, 1943

In accordance with section 239 of the Judicial Code (28 U. S. C., section 346), it is ordered that the entire record in this case be certified up to this Court so that the whole matter in controversy may be considered by the Court.

FILE COPY

No. 871

U.S. Supreme Court, U. S.
APPEAL

APR 30 1943

MAIL BUREAU SUPPLY
PORTLAND

**In the Supreme Court
of the United States**

MINORU YASUI,

APPELLANT,

vs.

UNITED STATES OF AMERICA,

APPELLEE.

Certified from the United States Circuit Court of Appeals for the Ninth Circuit by Order of the Supreme Court of the United States, so that the whole matter in controversy may be considered and decided as on appeal.

APPELLANT'S BRIEF

E. F. BERNARD,
Spalding Building,
Portland, Oregon,

RALPH E. MOODY,
Guardian Building,
Salem, Oregon,

Counsel for Appellant.

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In the Supreme Court of the United States

MINORU YASUI,

APPELLANT,

vs.

UNITED STATES OF AMERICA,

APPELLEE.

Certified from the United States Circuit Court of Appeals for the Ninth Circuit by Order of the Supreme Court of the United States, so that the whole matter in controversy may be considered and decided as on appeal.

APPELLANT'S BRIEF

The opinion of the District Court of the United States for the District of Oregon, adjudging the defendant guilty, United States of America v. Minoru Yasui, is reported in 48 F. Supp. 40. An appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit which, after argument, certified two questions to this Court. This Court, on its own

motion, ordered the entire record sent up so that it might consider and decide the whole matter in controversy.

STATEMENT OF THE CASE

The appellant was indicted in the District Court of the United States for the District of Oregon for a violation of Public Proclamation No. 3 of the Western Defense Command and Public Law No. 503, 77th Congress, approved March 21, 1942. He entered a plea of not guilty, waived a trial by jury, and elected to be tried by the Court. He was convicted and sentenced to pay a fine of Five Thousand Dollars and be imprisoned for a term of one year. Public Law No. 503 is codified as 18 U.S.C.A., Section 97A, and the indictment is set forth on pages 2-6 of the record.

At the conclusion of all the evidence in the case, the appellant interposed a motion for a verdict and judgment of not guilty, which raised the question of the sufficiency of the indictment and of the evidence, and the validity of the statute and proclamation mentioned above, and of Executive Order 9066. The appellant contended, among other things, that the proof showed he was a citizen of the United States of America and that the law, Executive Order, and proclamation mentioned were void as to citizens.

The court overruled the appellant's motion, holding that the regulation was void as to citizens of the United States but finding that the appellant was not

a citizen of the United States but a subject of the Emperor of Japan.

Exceptions were duly saved by the appellant to the ruling of the court denying the motion for a verdict and judgment of acquittal, and to the findings of the court to the effect that the appellant was not a citizen of the United States but a subject of the Emperor of Japan, and objected and excepted to the court imposing any sentence in the case. The exceptions were allowed by the court. (R. 88-90)

On February 19, 1942, the President of the United States issued Executive Order No. 9066. This order appears in 7 F.R. 1407, and is as follows:

"Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U.S.C., Title 50, Sec. 104) :

"Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders who he may from time to time designate, whenever he or any designated Commander deems such action necessary or

desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restrictive areas.

"I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops

and other Federal Agencies, with authority to accept assistance of state and local agencies.

"I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities and services.

"This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder."

On March 2, 1942, the Western Defense Command, by Public Proclamation No. 1 (7 F.R. 2320), established Military Areas Nos. 1 and 2, and, on March 24, 1942, issued Proclamation No. 3 (7 F.R. 2543), which is as follows:

**"HEADQUARTERS
WESTERN DEFENSE COMMAND
and FOURTH ARMY
Presidio of San Francisco, California
PUBLIC PROCLAMATION NO. 3**

March 24, 1942.

**"TO: The people within the States of Washington,
Oregon, California, Montana, Idaho, Nevada,
Utah and Arizona, and the Public Generally:**

**"WHEREAS, by Public Proclamation No. 1,
dated March 2, 1942, this headquarters, there were
designated and established Military Areas Nos. 1
and 2 and Zones thereof, and**

**"WHEREAS, by Public Proclamation No. 2,
dated March 16, 1942, this headquarters, there
were designated and established Military Areas
Nos. 3, 4, 5 and 6 and Zones thereof, and**

**"WHEREAS, the present situation within
these Military Areas and Zones requires as a mat-
ter of military necessity the establishment of cer-
tain regulations pertaining to all enemy aliens and
all persons of Japanese ancestry within said Mili-
tary Areas and Zones thereof :**

**NOW THEREFORE, I, J. L. DEWITT, Lieu-
tenant General, U. S. Army, by virtue of the au-
thority vested in me by the President of the United
States and by the Secretary of War and my powers
and prerogatives as Commanding General, West-**

ern Defense Command, do hereby declare and establish the following regulations covering the conduct to be observed by all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the Military Areas above described, or such portions thereof as are hereinafter mentioned:

1: From and after 6:00 A.M., March 27, 1942, all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1, or within any of the Zones established within Military Area No. 2, as those areas are defined and described in Public Proclamation No. 1, dated March 2, 1942, this headquarters, or within the geographical limits of the designated Zones established within Military Areas Nos. 3, 4, 5, and 6, as those areas are defined and described in Public Proclamation No. 2, dated March 16, 1942, this headquarters, or within any of such additional Zones as may hereafter be similarly designated and defined, shall be within their place of residence between the hours of 8:00 P.M. and 6:00 A.M., which period is hereinafter referred to as the hours of curfew.

2. At all other times all such persons shall be only at their place of residence or employment or traveling between those places or within a distance of not more than five miles from their place of residence.

3. Nothing in paragraph 2 shall be construed to prohibit any of the above specified persons from visiting the nearest United States Post Office, United States Employment Service Office, or office operated or maintained by the Wartime Civil Control Administration, for the purpose of transacting any business or the making of any arrangements reasonably necessary to accomplish evacuation; nor be construed to prohibit travel under duly issued change of residence notice and travel permit provided for in paragraph 5 of Public Proclamations Numbers 1 and 2. Travel performed in change of residence to a place outside the prohibited and restricted areas may be performed without regard to curfew hours.

4. Any person violating these regulations will be subject to immediate exclusion from the Military Areas and Zones specified in paragraph 1 and to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled 'An Act to Provide a Penalty for violation of Restrictions or Orders with respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zone.' In the case of any alien enemy, such person will in addition be subject to immediate apprehension and internment.

5. By subsequent proclamation or order there will be prescribed those classes of persons who will be entitled to apply for exemptions from exclusion

orders, hereafter to be issued. Persons granted such exemption will likewise and at the same time also be exempted from the operation of the curfew regulations of this proclamation.

6. After March 31, 1942, no person of Japanese ancestry shall have in his possession or use or operate at any time or place within any of the Military Areas 1 to 6 inclusive, as established and defined in Public Proclamations Nos. 1 and 2, above mentioned any of the following items:

- (a) Firearms.
- (b) Weapons or implements of war or component parts thereof.
- (c) Ammunition.
- (d) Bombs.
- (e) Explosives or the component parts thereof.
- (f) Short-wave radio receiving sets having a frequency of 1,750 kilocycles or greater or of 540 kilocycles or less.
- (g) Radio transmitting sets.
- (h) Signal devices.
- (i) Codes or ciphers.
- (j) Cameras.

Any such person found in possession of any of the above named items in violation of the foregoing will be subject to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled 'An Act to Provide a Penalty for Violation of Restrictions or Orders with

Respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zone.'

7. The regulations herein prescribed with reference to the observance of curfew hours by enemy aliens, are substituted for and supersede the regulations of the United States Attorney General heretofore in force in certain limited areas. All curfew exemptions heretofore granted by the United States Attorneys are hereby revoked effective as of 6:00 a.m., PWT, March 27, 1942.

8. The Federal Bureau of Investigation is designated as the agency to enforce the foregoing provisions. It is requested that the civil police within the states affected by this Proclamation assist the Federal Bureau of Investigation by reporting to it the names and addresses of all persons believed to have violated these regulations.

J. L. DEWITT
Lieutenant General, U. S. Army
Commanding."

It was admitted at the trial that on the date mentioned in the indictment the defendant wilfully failed to remain in his place of residence between the curfew hours. He contended, however, that he was a citizen of the United States of America by birth, that he had never lost that citizenship, and that the law and proclamation which he was charged with violating could constitutionally have no application to citizens of the United States of Japanese ancestry.

**SPECIFICATION OF THE ASSIGNED ERRORS
TO BE RELIED UPON**

Assignment No. 1. (R. 218) The court erred in overruling the defendant's motion for a directed verdict of not guilty and for a verdict and judgment of not guilty for the reason and upon the ground that the defendant is and at all times has been a citizen of the United States of America and because the regulations which he is charged with having violated are void as to citizens of the United States of America and void as to citizens of United States of America of Japanese ancestry and particularly the defendant in that they deprive such citizens and the defendant of life, liberty and property without due process of law and in that the regulations are discriminatory in contravention of the Fifth Amendment to the Constitution of the United States of America and for the further reason and upon the further ground that the indictment does not charge that the defendant is an alien but alleges facts from which it appears that he is and at all times has been a citizen of the United States of America.

Assignment No. 2: (R. 218) The court erred in finding that the defendant is not a citizen of the United States of America for the reason and upon the ground that the evidence in the case is beyond dispute that the defendant is and at all times has been a citizen of the United States of America and for the further reason and upon the further ground that the indictment does not charge that the defendant is an alien

but alleges facts from which it appears that he is a citizen of the United States.

Assignment No. 3: (R. 219) The court erred in finding that the defendant was a citizen of Japan for the reason and upon the ground that there is no evidence in the case upon which such a finding can be based and for the further reason that the indictment does not charge that the defendant is a citizen of Japan or an alien but alleges facts from which it appears that the defendant is and at all times has been a citizen of the United States of America.

Assignment No. 4: (R. 219) The court erred in not finding that the defendant is and at the time of the commission of the acts charged in the indictment was and at all other times was a citizen of the United States of America, for the reason and upon the ground that the evidence is beyond dispute that the defendant has at all times been a citizen of the United States of America and for the further reason and upon the further ground that there is no evidence that the defendant has ever been a citizen of any country other than the United States of America and for the further reason and upon the further ground that the indictment alleges that the defendant is a citizen of the United States of America.

Assignment No. 5: (R. 219-220) The court erred in overruling the defendant's objection to the imposing of any sentence against him for the reason and upon the ground that the indictment in the case does not charge that the defendant is or was an alien but al-

leges facts sufficient to show that the defendant at all times has been a citizen of the United States of America.

SUMMARY OF THE ARGUMENT

The indictment alleges that the appellant "is a person of Japanese ancestry; that he was born at Hood River, Oregon, on the 19th day of October, 1916." If the regulation which the appellant is charged with violating is void as to citizens the indictment does not charge an offense. It does not charge that the appellant is an alien Japanese and cannot support a finding that he is such. *United States v. Standard Brewery*, 251 U.S. 210, 220; *Harris v. United States*, 104 F. (2d) 41, 43-45.

The evidence in the case was beyond dispute that the appellant was born in the United States of alien parents who had a permanent residence and domicile in the United States. The parents were carrying on business in the United States and were not in the diplomatic service. Under the Fourteenth Amendment to the Constitution the appellant was a citizen of the United States from the time of his birth. *United States v. Wong Kim Ark*, 169 U.S. 649; 8 U.S.C.A. 800.

The evidence in the case was beyond dispute that the appellant continued to reside and have his domicile in the United States from the time of his birth. He was not, by international or other law, a citizen of Japan or a subject of the Emperor of Japan. *United*

States v. Wong Kim Ark, *supra*; Moore, International Law, Vol. 3, p. 518; 12 Harvard Law Review, 55-56; 8 U.S.C.A. 800.

If the appellant ever was required to make an election as to citizenship, the oath of allegiance which he took on arriving at the age of majority was irrevocable and final. Moore, International Law, Vol. 3, pp. 545-546.

A citizen of the United States may be expatriated only when and in the manner permitted by law. 8 U.S.C.A. 801.

The government must exercise the war power within the constitution, not in defiance of it. *Ex Parte Milligan*, 71 U.S. 2, 121; *Highland v. Russell Car Co.*, 279 U.S. 253, 261; *Hamilton v. Kentucky Distilleries*, 251 U.S. 146, 155-156; *United States v. Cohen Grocery Co.*, 255 U.S. 81, 88.

The existence of war does not suspend the operation of the Fifth and Sixth Amendments of the Constitution of the United States relating to personal equality, due process of law, and the taking of private property for public use. *Ex Parte Milligan*, *supra*; *United States v. Cohen Grocery Co.*, *supra*; *United States v. Bernstein*, 267 Fed. 295, 296.

Neither Congress nor the President may constitutionally delegate to the military a legislative power over civilians in the absence of a declaration of martial law. *Ex Parte Milligan*, *supra*; *United States v. Yasui*, 48 F. Supp. 40.

Emergency does not create power or diminish constitutional restrictions. *Home Building Assn. v. Blaisdell*, 290 U.S. 398, 426; *Schechter v. United States*, 295 U.S. 495, 528.

Qualified martial law cannot exist. *Bishop v. Vandercrook*, 228 Mich. 299, 200 N.W. 278; 67 C.J. p. 425.

That the Fifth Amendment does not contain an equal protection clause does not mean that there may not be a discrimination of such an unjust character as to bring into operation the due process clause. *Currin v. Wallace*, 306 U.S. 1, 14.

Equality is guaranteed by the due process clause. *Truax v. Corrigan*, 257 U.S. 312, 332.

The restraint imposed upon legislation by the due process clauses of the Fifth and Fourteenth Amendments are the same. *Heiner v. Donnan*, 285 U.S. 312, 326; *Coolidge v. Long*, 282 U.S. 582, 596.

A law or regulation which forbids citizens of one ancestry or color to do things which citizens of another ancestry or color are permitted to do or which selects a particular race or nationality for oppressive treatment does not afford due process of law or equal protection of the law. *Buchanan v. Warley*, 245 U.S. 60; *Truax v. Raich*, 239 U.S. 33, 39; *Yick Wo v. Hopkins*, 118 U.S. 356; *Yu Chong Eng, et al. v. Trinidad, et al.*, 271 U.S. 500; *Missouri, ex rel. Gaines v. Canada*, 305 U.S. 337; *Skinner v. Oklahoma*, 316 U.S. 535, 541; *Re opinion of Justices*, 207 Mass. 601, 94 N.E. 558.

ARGUMENT**The Indictment Does Not Charge That Appellant
is an Alien Japanese**

Public Proclamation No. 3 purports to require all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing within the geographical limits described to be in their places of residence between the hours of 8:00 P.M. and 6:00 A.M., which period is referred to as the hours of curfew. It is apparent from the proclamation that alien Japanese considered as a class distinct from persons of Japanese ancestry, and that persons of Japanese ancestry are not included in the classification relating to alien Japanese, or at least not necessarily so.

The indictment does not charge that the defendant is an alien Japanese, but the allegation is "that Minoru Yasui is a person of Japanese ancestry; that he was born at Hood River, Oregon, on the 19th day of October, 1916". Citizenship being the rule and alienage the exception, the presumption would be, from the allegation of birth in the United States, that appellant is a citizen of the United States. If the contention of the appellant is correct, as the District Court found, that the law, order, and proclamation made the basis of the indictment are void as to American citizens of Japanese ancestry, then to charge a crime it is necessary to state facts from which the court can draw a conclusion as a matter of law that appellant is an alien Japanese. An indictment must be direct and certain as to the

crime charged and the particular facts and circumstances when such are necessary to a completed offense. All the material facts and circumstances embraced in the definition of the offense must be stated in the indictment and the omission of any essential element cannot be supplied by intendment or implication. *United States v. Standard Brewery*, 251 U.S. 210, 220. Allegations of essential elements of a statutory offense are matters of substance and not of form and their omission is not aided or cured by verdict. *Harris v. United States* (C.C.A. Mo. 1939), 104 F. (2d) 41, 43-45.

It cannot be said from an inspection of the indictment that the defendant is an alien Japanese. As the indictment does not so allege, it cannot be made the basis of a finding that the appellant is an alien Japanese.

**The Evidence in the Case Required a Finding That
Appellant is a Citizen of the United States
of America**

The appellant was born in the United States of America at Hood River, Oregon, on the 19th day of October, 1916. (Government Ex. 7, R. 77, 148.) At that time his father was engaged in business at Hood River as a merchant and his mother was a housewife, and both of his parents were residents and inhabitants of that place. Neither of the parents were in the diplomatic service of any country. (Def. Ex. 10, R. 82.) The appellant, therefore, on his birth became a citizen

of the United States of America. "All persons born * * * in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside". Amendment XIV, Constitution of the United States. A person born in the United States of alien parents who are regularly domiciled in the United States and who are not engaged in diplomatic service is a citizen of the United States. *U. S. v. Wong Kim Ark*, 169 U.S. 649; *Morrison v. California*, 291 U.S. 82, 85. The opinion of the trial court (R. 46-47), while admitting the fact of appellant's citizenship by birth, says:

(Page 54, 48 F. Supp.)

"By international law however he was also a citizen of Japan and subject of the Emperor of Japan. According to international law, also, he had, upon attaining majority but not before, the right of election as to whether he would accept citizenship in the United States or give his allegiance to the Emperor"

No reference or authority is quoted in support of the first statement. In support of the second, cases are cited where children born in this country of alien parents were taken by the parents to their native land and where the children, by reason of years of residence in such land, became subject to the jurisdiction thereof. A third case is cited where a person naturalized in this country returned to his native land and reassumed his allegiance to it. The appellant denies that by international law he was a citizen of Japan or

a subject of the Emperor of Japan, denies that according to international law he had, upon attaining majority, the right of election as to whether he would accept citizenship in the United States or give his allegiance to the Emperor, and asserts that at all events, if he was required to make an election, he at all times elected to be and remain a citizen of the United States by repeated acts and by most solemn declarations.

Allegiance is a necessary concomitant of citizenship. Double allegiance arises from the conflict of two nations each superior within its own borders. The conflict is obviated by the rule that the liability of the child to the performance of the duties of allegiance is determined by the laws of that one of the two countries in which he actually is. Moore, International Law, Vol. 3, Sec. 425, p. 518. In the cases referred to by the trial court, the foreign nation could assert its citizenship law by reason of the individual's residence within its borders. Such is not this case, for the appellant and his parents have continuously resided within the United States of America. It is a well established principle of public law that the municipal laws of a country have no effect within the limits of another power, beyond such as the latter may think proper to concede them. Moore, International Law, Vol. 3, Sec. 374, p. 283. At all times during his minority, the appellant was a citizen of the United States. Letter of Frelinghuysen, Secretary of State, Moore, International Law, Vol. 3, Sec. 428, p. 532.

There is no evidence in the case as to the law of Japan. Although the law of that country could have no application within the United States, yet it is evident that, before a question of double allegiance could arise, there must have been two claims for allegiance. If the country to which the parents belong does not claim the allegiance of the foreign born children of its citizens no question of double allegiance can arise. Moore, International Law, Vol. 3, Sec. 425, p. 518. There is no evidence in this case that either the Government of Japan or the Emperor of that country claimed the allegiance of the appellant or that the laws of Japan would have authorized such a claim.

The question of double allegiance does not arise by international law but by the concurrent operation of two different laws.

"Citizenship is a question not of international but of municipal law. The division of the law of citizenship into the *jus sanguinis* and the *jus soli* is a deduction from the division of the jurisdiction of a State into the personal and the territorial. In the civil law, citizenship is by descent. At common law, all those born within the kingdom of legeance of the crown were held subjects; and if the United States have a common law this ancient rule governs. *Calvin's Case*, 7 Rep. 1. Whatever abstract rules there may be, the right of every sovereignty to determine for itself by its own laws who are its citizens is a fundamental one. By the Fourteenth Amendment of the United States Con-

stitution 'all persons born or naturalized within the United States are citizens;' the exception is that those not born 'subject to jurisdiction thereof' are not citizens. Are the children of aliens within the exception? When within our territory, the sovereigns, the diplomats, sailors upon ships of war, and soldiers in the organized military forces of a foreign state, are not subject to our jurisdiction. Children born of parents under these circumstances of extra-territoriality would not be citizens. The same is true of the children born to tribal Indians. The logic of these exceptions of sovereignty, however, does not apply to the alien subject domiciled in the United States. He is subject to the territorial jurisdiction; his children are born subject to our jurisdiction; and these, by our municipal law, are citizens . . ." 12 Harvard Law Review, 55-56.

The opinion of the trial court on the question of appellant's citizenship is contrary to the reasoning of the court in *United States v. Wong Kim Ark*, supra. In that case the court had for determination the citizenship of one who had been born in the United States of alien Chinese parents domiciled here. By the government it was contended that children born here of alien parents took the citizenship of the parents and, therefore, were not "subject to the jurisdiction" within the meaning of the Fourteenth Amendment. The historical background of the amendment was thoroughly explored and in the course of its opinion the court said:

(Page 662, 169 U.S.)

"In *United States v. Rhodes* (1866), Mr. Justice Swayne, sitting in the Circuit Court, said: 'All persons born in the allegiance of the King are natural-born subjects, and all persons born in the allegiance of the United States are natural-born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England. . . . We find no warrant for the opinion that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor, and subject only to the same exceptions, since as before the Revolution.' " 1 Abb. (U.S.) 28, 40, 41.

(Page 666, 169 U.S.)

"It was contended by one of the learned counsel for the United States that the rule of the Roman law, by which the citizenship of the child followed that of the parent, was the true rule of international law, as now recognized in most civilized countries, and had superseded the rule of the common law, depending on birth within the realm, originally founded on feudal considerations. . . ."

In rejecting this contention the court said:

(Page 667, 169 U.S.)

"There is, therefore, little ground for the theory that, at the time of the adoption of the 14th Amendment of the Constitution of the United

States, there was any settled and definite rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.

"Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own Constitution and laws, what classes of persons shall be entitled to its citizenship."

The Court quoted from an opinion of Justice Marshall in the case of *The Exchange*, 11 U.S. 7, Cranch, 116, as follows:

(Page 683, 169 U.S.)

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitations not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. . . ."

It is a contemptible concession to the power of any foreign government to say that such government can

command allegiance to it from a person not only born in the United States but a continual resident and inhabitant of it. It is a pernicious doctrine which asserts that a child born in the United States of alien parents regularly domiciled therein who continues, with his parents, to remain a resident and inhabitant of the United States, owes any allegiance to the land of his parents or has an inchoate right of citizenship in it during his minority. It permits a foreign government to add a proviso to the Fourteenth Amendment to the Constitution of the United States. It demands of all citizens of the United States born of alien parentage duties of election heretofore unknown. No natural born citizen of the United States can owe any allegiance to or have citizenship in any foreign government unless he has voluntarily expatriated himself in the manner provided by law. The existence of this kind of dual citizenship has been repudiated by the United States. Title 8, Sec. 800, U.S.C.A., is as follows:

"Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of pub-

lic peace that this claim of foreign allegiance should be promptly and finally disavowed; Therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic."

The appellant reached the age of majority on October 19, 1937. O.C.L.A., Sec. 63-501. The record of his birth was filed with the Oregon State Board of Health and was never recorded any other place. (R. 150) His father continued in business at Hood River, Oregon, throughout the years, and his mother continued to there reside as a housewife. The only time the appellant has been outside of the United States, with the exception of four hours spent in Mexico, was in 1925, when he was taken on a short vacation trip to Japan. (R. 151-152) He never resided in any foreign country. (R. 153) He attended the public schools in Hood River, and entered the University of Oregon in 1933, receiving his Bachelor of Arts Degree in 1937. (R. 153-154) While attending the University of Oregon, he took a military course which unquestionably was not compulsory. He completed this course in June, 1937. As he had not then attained the age of majority he was not granted his commission in the United States Army until December, 1937, at which time, having reached the age of majority, he took the oath of allegiance to the United States of America. (R. 174) If an election as to citizenship was necessary, here it was made in

the most solemn form. When such an election is made it is final. Moore, International Law, Vol. 3, Sec. 430, pp. 545-546. In June, 1939, appellant completed his law course at the University of Oregon. He returned to Hood River County and worked in the summertime as a ranch hand and, in September of 1939, passed the bar examinations and was admitted to practice in the State of Oregon. (R. 155) To secure his license it was necessary that he be a citizen of the United States of America and that he take an oath of office to support the Constitution and laws of the United States. Sections 47-302 and 47-306, O.C.L.A.

He never took an oath of allegiance to any country save the United States of America, and exercised the rights of citizenship by voting in the State of Oregon. (R. 154, 157)

The appellant's parents are Methodists (R. 195), and the only Japanese organizations with which appellant is connected are the Japanese Methodist Church and the Japanese-American Citizens' League. (R. 178, 196) Neither the appellant nor his parents give adherence to the principles of Shinto, and appellant has never accepted the divine pretensions on the part of the Emperor of Japan. (R. 194-196)

After admission to the bar, appellant practiced law until April, 1940. At that time he secured employment as a secretary in the office of the Consulate-General of Japan at Chicago, Illinois. Along with all other employees, he was required to be registered with the Secretary of State at Washington, D.C., and in his

registration his nationality was given as United States citizen. (R. 59) His salary was \$125.00 per month, and his duties consisted of opening and answering mail and making speeches before civic clubs. He had hoped to bring about better relations between the United States and Japan. (R. 181-182), did nothing detrimental to the United States of America (R. 191), and there is no evidence that during the time he was employed by the Consulate-General's office he did any act or said anything inconsistent with his citizenship in or allegiance to the United States. (R. 151) A citizen of the United States can expatriate himself only in the manner provided by law (Title 8, Sec. 801, U.S.C.A.), and the appellant did nothing which would bring about his expatriation. (R. 172-174)

On December 8, 1941, appellant resigned his position in the Consulate-General's office, because he felt that as a loyal American citizen he could not be working for the Japanese Consulate after the declaration of war. (R. 160) He immediately and repeatedly offered to go into active service in the United States Army. (R. 84-86) Under date of March 28, 1942 (R. 85, 86), he was notified that a physical disability, defective vision, would be waived for limited service, and that he would be retained in the Infantry Reserve with eligibility for limited service only.

The appellant's employment by the Consulate-General's office is one of the two things to which reference is made in the opinion of the trial court as the basis for a finding that appellant is a citizen of Japan.

Title 8, Section 801, subdivision d, U.S.C.A. provides that a United States citizen shall lose his nationality by accepting or performing the duties of any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible. It is not claimed that the duties of appellant's employment could only be performed by Japanese nationals. Other American citizens were employed in the department. The record in the case lacks any evidence that appellant's duties required him to do anything inimical to the interests of the United States or anything contrary to the oath of allegiance to the United States which he had taken over two and one-half years before. If he had been able to carry out his desire to preserve friendly relations between his country and Japan, he would have earned the gratitude of all Americans. That he was unable to do so is no reason for depriving him of the American citizenship which is his birthright.

The other circumstance referred to by the trial court is that in 1940 appellant's father received some recognition from the government of Japan. The only evidence in the record is that such recognition was given because of the work appellant's father had performed in promoting better relations between the Japanese and Americans in the Hood River Valley. If the Government contended that such recognition was granted for more sinister reasons and that a penalty should be visited on the son, it should have been

in a position to produce what it claimed to be the facts. Instead, it produced nothing. Innuendo is not evidence. It is in the record, however, that on the night of December 8, 1941, appellant received a telegram from his father reading as follows: "As war has started your country needs your services as a United States Reserve Officer. I as your father strongly urge you to respond to the call immediately". (R. 83, 161)

The right to citizenship in the United States is precious to the appellant, but the question raised on this feature of the case goes far beyond his own personal interests. In this country are millions of persons born here of alien parentage who know no other country. The appellant is one of them. These people from early childhood have learned in the schools to daily "pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one nation indivisible, with liberty and justice for all". They have been taught that the United States is the one country where all men are born equal and where no person will ever be discriminated against because of religion, race, or color. They have learned that this and this alone is their country. To them double allegiance and the right of election between conflicting citizenships are unknown. This country should reject any idea that a child born here of alien parentage, who remains with his parents until reaching the age of majority, owes the faintest trace of allegiance to any foreign government or can deny allegiance to the country that has sheltered, protected, and educated him from the cradle to manhood.

The effect of the decision of the trial court is to deprive the appellant of the right of citizenship which he acquired by birth, in contravention of the Fourteenth Amendment to the Constitution.

Executive Order No. 9066

This order, issued February 19, 1942, contains a preamble reciting that the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises and national defense utilities as defined by statute. It then vests in the Secretary of War and such Military Commanders whom he may from time to time designate, whenever he or any designated commander deems such action necessary or desirable, authority to prescribe Military areas in such places and of such extent as he or the proper military Commander may determine, from which any or all persons may be excluded and with respect to which the right of any person to enter, remain in or leave shall be subject to whatever restrictions the Secretary of War or the proper Military Commander may impose in his discretion. The Secretary of War and the proper Military Commanders under the order may take such steps as he or they may deem advisable to enforce compliance with the restrictions in any military area, including the use of Federal troops.

When this proclamation was issued, the United States was engaged in a great war. It is said by the

Government and it is no doubt true that there was a possibility that the Pacific Coast states might be attacked by hostile force. The Government was entitled to exercise all of its great war powers under the constitution, and those charged with the duty of carrying on the war would have been derelict in duty had they failed to do so.

The operation of the Constitution of the United States, however, had not been suspended. The Government was exercising its war powers under the Constitution, not in defiance of it. *Ex parte Milligan*, 71 U.S. 2, 120; *Highland v. Russell Car Co.*, 279 U.S. 253, 261; *Hamilton v. Kentucky Distilleries*, 251 U.S. 146, 155-156; *U. S. v. Cohen Grocery Co.*, 255 U.S. 81, 88. Martial law had not been declared. Congress was in daily session. All executive branches of the Government were functioning and the sittings of the Federal judiciary were uninterrupted. None of the states of the Pacific Coast were under siege. No part was occupied by a hostile force. The civil authorities of all of these states were functioning as uninterruptedly as in time of peace.

In view of the situation then existing, Executive Order No. 9066 and the scope of the authority attempted to be delegated by it challenge attention. It was proposed that the country be divided into military areas by Military Commanders unnamed, these military areas to be wherever and of such areas as the Military Commanders might deem either necessary or desirable. These Military Commanders in their sole

discretion were to have power to say not only who could enter and leave the areas and under what conditions but under what restrictions all persons could remain. Complete dictatorial powers were granted without limit and with full authority to define the territorial extent of the jurisdiction so to be exercised. The grant of power to a Military Commander to fix the location and boundaries of the military area and the conditions under which persons may remain in such area is total subjection of civilians to unrestrained military command and void under the doctrines announced in *Ex Parte Milligan*, *supra*, to which more detailed reference will be made.

Public Proclamation No. 3

This proclamation singles out American citizens of Japanese ancestry, places them in the same category as alien Japanese, alien Germans, and alien Italians, and requires them to be in their place of residence during the hours of curfew. It was issued by the Western Defense Command under the authority of Executive Order No. 9036 for the alleged purpose, as recited in the Executive Order, of preventing espionage and sabotage. Aside from the illegality of the proclamation, a more complete insult to a group of American citizens could not have been devised.

Those from other countries of the world who settled in the United States did so for a chance to make homes and work in a free country governed by just laws which promise equal protection to all who abide

by them. *Ex parte Kawato*, 317 U.S. 69, 71. The Japanese who settled in the United States are known to be industrious and law-abiding people. The farms which they tilled were models of husbandry, and their markets were patronized by white people generally with no thought of race prejudice. That they are a law-abiding people appears from the infrequent mention of their names in the criminal reports. They of course were wont to associate among themselves, as did the Chinese, and the aliens from every country in the world who sought haven in the United States.

They brought into the world children, as did those children, with a birthright of American citizenship in the United States. Allegiance was demanded and, in return, the protection of equal laws was guaranteed. These children were raised in the public schools with children of all races. The principles of American government were instilled in them and they were taught the glories and traditions of American history. They took on the language, dress, and customs of the ordinary American and no doubt dreamed the same ideals. Many have fought in the armies of the United States and at this moment thousands are offering their lives for the country of their birth. It is doubtful if a handful of those charged with the enforcement of the proclamation here involved could distinguish between the ordinary American citizens of Japanese and Chinese ancestry.

The Government has argued that American citizens of Japanese ancestry have not been assimilated into

American life and for that reason they might be more apt to have a trace of loyalty to the Emperor of Japan which would cause them to commit acts of sabotage or espionage. From what has been said and from what the Court must know of its own knowledge, the Japanese-Americans have been assimilated into the American life; of course not completely so, any more than the Chinese or negroes. However, they have all taken their places in the pattern of American life. Repressive measures at times have been taken against these races and these repressive measures are now pointed to as a reason why peoples of these races have not been assimilated. Patriotism does not spring from color or race. By the same argument, in days to come the Government may argue that the Japanese-Americans have not been assimilated into American life because during World War II they were locked up in concentration camps. The fault is ours, not theirs.

It has not been claimed by the Government that there were any acts or attempted acts of sabotage on the part of American citizens of Japanese ancestry which called for any such repressive measures as Public Proclamation No. 3. It has not been claimed by the Government that there were any arrests of American citizens of Japanese ancestry for such activities. The Government must be forced to contend, therefore, that Public Proclamation No. 3 is justified because the military commander thought that among the thousands of Americans of Japanese ancestry there might possibly be some who would be inclined to sabotage or

espionage and therefore it was proper to restrict all so that an unnamed, unnumbered, speculative few might be deterred.

A plausible reason can always be advanced by a government as an excuse for the suppression of a minority. The usual one is suspicion of disloyalty, advanced in Europe to justify imprisonment and murder. In its brief, filed in the Court of Appeals, the Government pointed to German created evacuated areas along the Dutch and French Coasts as an argument that the United States should possess the power to evacuate citizens of Japanese ancestry. We are not engaged with Germany in a contest of brutality toward civilians. If the authority claimed by the Government in this case cannot be found in the Constitution, it should not be exercised in an effort to emulate Hitler.

Ex Parte Milligan

In this case a citizen of the United States who had been tried, convicted and sentenced to death by a military court for conspiracy and subversive measures against the Federal government, applied for habeas corpus. He was a citizen of the State of Indiana which, although it had been previously invaded and was threatened with invasion, was not at the time under occupation by any hostile troops. The opinion deals exhaustively with the law of civil and military power and, after setting forth the provisions of the Fourth, Fifth and Sixth Amendments to the Federal Constitution, the Court said:

(Pages 120-121, 71 U.S.)

"* * * These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious

consequences, was ever invented by the wit of men than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

Answering the claim that the jurisdiction complained of was justifiable under the laws and usages of war the Court, among other things, said:

(Pages 124-125, 71 U.S.)

"If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within the limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

"The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and

effectually renders the ‘military independent of and superior to the civil power’—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable and, in the conflict, one or the other must perish.

“This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate.

“If our fathers had failed to provide for just such a contingency, they would have been false to the trust imposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporat-

ing in a written constitution the safeguards which time has proved were essential to its preservation. Not one of those safeguards can the President or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus."

The Milligan case was cited with approval in *Sterling v. Constantin, et al.*, 287 U.S. 378, 402. That case was a suit to enjoin the Governor of the State of Texas, the Adjutant General of the State, and the Brigadier General of the Texas National Guard from enforcing certain military or executive orders. The executive and military orders were based on a proclamation of the Governor stating that certain counties were in a state of insurrection, tumult, riot, and a breaching of the peace, and declared martial law. The court held that the allowable limitations of military discretion and whether or not they have been overstepped in a particular case are judicial questions, and, after citing the Milligan case and quoting from that portion of it which we have set out above, the Court sustained the issuance of an injunction against the defendant.

In the Milligan case, it appears that the Military granted Milligan a trial, although by court martial; in this case no hearing was granted to the appellant or any of the American citizens of Japanese ancestry to be affected by the proclamation.

The Opinion of the District Court

The District Court has held Public Proclamation No. 3 void as to American citizens and its decision follows as of necessity from the principles announced in *Ex Parte Milligan*, *supra*, which for over three quarters of a century have stood as a bulwark protecting civilians from military rule.

The court held that there should be no disposition, either in peace or war, to wear away the fundamental guarantees of liberty of the individual; that a military commander has no right to legislate and pass statutes to be enforced by the civil courts; that a military commander has no power to issue regulations binding on citizens in civil life in the absence of a declaration of martial law; that there is no such thing as partial martial law; that the proclamations and regulations of a military commander cannot be enforced in the civil courts; that congress could not make constitutionally a distinction relating to the conduct of citizens based on race; and that Congress could not make acts of citizens criminal simply because such acts were in violation of orders to be issued in the future.

No useful purpose would be served here by repeating the citations to be found in the opinion of the District Court. In the Court of Appeals, the Government sought to evade the force of the opinion by arguing that the proclamation, law and order here involved were a valid exercise of the war powers of Congress and of the President.

The War Power

Earlier in this brief the war power and the necessity for the exercise of it are recognized. The Government has heretofore cited a number of cases dealing with the extent of that power. An examination of those most prominently mentioned discloses that none of them support the legality of the law, order, and proclamation here involved. All of them, either by implication or express declaration, recognize, as do *Ex Parte Milligan*, *supra*, *United States v. Cohen Grocery Co.*, *supra*, and *United States v. Bernstein*, *supra*, that the existence of war does not suspend the guarantees of the Fifth and Sixth Amendments to the Constitution relating to personal equality, due process of law, and the taking of private property for public use. These amendments were written shortly after the American Revolution by men who had taken part in it, and it is significant that it was not written that no person should be deprived of life, liberty, or property without due process of law except in time of war. The prohibition against such governmental action is without any express limitation.

The Government has referred to a class of cases dealing with the power to fix prices in time of war, of which *Highland v. Russell*, 279 U.S. 253, 258, 261-262, is a fair selection. That case involved the validity of the Lever Act which authorized the President to fix the price of coal, and the Court recognized that even in time of war property could not be taken without due process of law. The Court said:

(Pages 258, 261-262, 279 U.S.)

"Plaintiff does not claim that the amount paid by defendant was not compensatory or that it did not give him a reasonable profit or that the value of the coal was greater than the prices fixed by the President * * *."

"Under the Constitution and subject to the safeguards there set forth for the protection of life, liberty and property (*Ex Parte Milligan*, 4 Wall. 2, 121; *Hamilton v. Kentucky Distilleries*, 251 U.S. 146, 151; *United States v. Cohen Grocery Co.*, 255 U.S. 81, 88), the Congress and the President exert the war power of the nation, and they have wide discretion as to the means to be employed successfully to carry on * * *."

The operation of the Fifth Amendment is recognized in those cases dealing with the rent laws such as *Block v. Hirsch*, 256 U.S. 135, 157, where it is said: "Machinery is provided to secure to the landlord a reasonable rent".

Likewise in cases involving the right of the Government to seize and operate utilities in time of war—cables and railroads—such as *Commercial Cable Co. v. Burleson*, 255 F. 99, 107, and *Northern Pacific Ry. Co. v. North Dakota*, 250 U.S. 135, 144-145. In the Commercial case it was pointed out that adequate provision was made for compensation to be fixed in the first instance by the President but with right of appeal to the Court of Claims. Adequate provision for com-

pensation was also made in the laws relating to seizure and operation of the railroads.

Even those cases which recognize the right of the Government in time of war to entirely suppress those evils which in time of peace it is within the province of the states to suppress, it is recognized that the war power is subject to constitutional limitations. The Government has the right in time of war to prohibit the sale of intoxicating liquors, *Hamilton v. Kentucky Distilleries*, *supra*, and to prevent the maintenance of houses of prostitution in the vicinity of army camps, *McKinley v. United States*, 249 U.S. 397, for the same reason that the states may take similar action in times of peace. The proposition is aptly stated in the *Hamilton case*:

(Pages 156-157, 251 U.S.)

" . . . The war power of the United States, like its other powers, and like the police power of the states, is subject to applicable constitutional limitations (*Ex Parte Milligan*, 4 Wall. 2, 121-127; *Monongahila Navigation Co. v. United States*, 148 U.S. 312, 336; *United States v. Joint Traffic Ass'n.*, 171 U.S. 505, 571; *McCray v. United States*, 195 U.S. 27, 61; *United States v. Cress*, 243 U.S. 316, 326); but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power. *In re Kemmler*, 136 U.S. 436, 448; *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401, 410. If the nature and conditions of a restriction upon

the use or disposition of property is such a state could, under the police power, impose it consistently with the Fourteenth Amendment, without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the Fifth Amendment without making compensation, for prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency."

It is submitted that no state, under the Fourteenth Amendment, could justify a law requiring all citizens of Japanese ancestry to remain within their homes during curfew hours even though the law had been enacted because of a suspicion that some of those in that class might be inclined to commit criminal offenses. The Fifth Amendment likewise restricts the Federal government in time of war.

In *Schenck v. United States*, 249 U.S. 47, 51-52, the factual situation should be noted. In that case, the defendant had been indicted for conspiracy to violate the Espionage Act, conspiracy to use the mails for transmission of nonmailable matter, and use of the mails for the transmission of the same matter. He attempted to justify under the First Amendment—free speech. The Court held that the character of the words and the circumstances under which they have been uttered must be considered, and said "the most stringent protection of free speech would not protect a man in falsely shouting 'Fire' in a theatre and causing panic". This case can have no application here where the ap-

pellant was not charged by the Western Defense Command with doing anything.

Reference is made by the Government to various cases discussing the power to deal with alien enemies in time of war. The plenary power of the Government with respect to this class of persons is conceded. In the Prize Cases, 67 U.S. 635, the Court held that all persons residing within the territory occupied by the hostile power are liable to be treated as enemies and that a ship leaving one of the ports in the occupied territory after a blockade had been declared and after the expiration of the time allowed for neutrals to leave was subject to seizure. *United States v. MacIntosh*, 283 U.S. 605, 615, was a naturalization proceeding wherein it appeared that the applicant would not bear arms in defense of this country if he was admitted to citizenship, and it was held that naturalization is a privilege to be given or withheld as Congress may determine. The Alien Property Custodian Law was involved in *Central Trust Co. v. Garvan*, 254 U.S. 554, 567, and it was noted that provision was made for any claimant to establish his right to the property.

Various miscellaneous cases have been cited, none of which would seem to support the claim of power made in the case at bar. *Respublica v. Sparhawk*, 1 Dal. 357, decided in the year 1788, held that during the American Revolution the Continental Congress had the right to direct removal of articles useful to the enemy and in danger of falling into their hands, and that the owner of the property so removed was not entitled

to compensation if the property was afterward captured by the enemy. In *Raymond v. Thomas*, 91 U.S. 712, 715-716, an officer in command of the armed forces of the United States assumed to annul a decree of the state courts. The Court said:

"It was an arbitrary stretch of authority, needful to no good end that can be imagined. Whether Congress could have conferred the power to do such an act is a question we are not called upon to decide. It is an unbending rule of law that the exercise of military power where the rights of citizens are concerned, shall never be pushed beyond what the exigency requires. *Mitchell v. Harmony*, 13 How. 115; *Warden v. Bailey*, 4 *Taunt.* 67; *Fabrigus v. Moysten*, 1 *Comp.* 161; s.c., 1 *Smith's L.C.* pt. 2 p. 934."

Hamilton v. Dillin, 88 U.S. 73, was an action to recover from the surveyor of the Port of Nashville, Tennessee, charges paid for permits to purchase and ship cotton to the loyal states, and it was held that the Government has the right to permit limited intercourse with the enemy under such conditions as it sees fit, such as payment of the charges involved. In *Miller v. United States*, 11 Wall. 268, 305, the Confiscation Acts passed during the Civil War were involved, and the court held that the power to declare war included the right to seize and confiscate all property of an enemy and dispose of it at the will of the captor. In *United States v. Sweeney*, 157 U.S. 281, an action by an officer to recover pay, the only question involved was

whether service in a volunteer regiment was service in the Army of the United States within the meaning of an applicable statute. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 326, involved the authority of the Federal government to construct a dam as a means of assuring abundant electric energy for the manufacture of munitions of war.

In the Court of Appeals the Government pointed to the Selective Draft Law cases, 245 U.S. 366, as presenting a factual situation most similar to that of the case at bar. In those cases the court was dealing with an Act of Congress, here with a proclamation of the military authorities; there it was considering the constitutional power to raise armies, it being said that "as the mind cannot conceive of an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice"; here, this Court is dealing with a claim on the part of the Government that it has the right to confine, on suspicion and without accusation or hearing, citizens of the United States merely because of ancestry. Allegiance demands a willingness to defend the country, not an abject submission to confinement on suspicion. Would it be said that a Selective Service Act which provided that American citizens of Japanese ancestry, and no others, or of Swedish ancestry, and no others, or of Scotch ancestry, and no others, or of Jewish ancestry, and no others, would be subject to induction into the army, was a constitutional

— exercise of the war power?

It is submitted that the war power of the Government—whether of Congress or the President—does not justify the law, order, and proclamation here in question and that the cases heretofore before this Court lend no support to the contention that it does. Emergency does not create power nor diminish constitutional restrictions. *Home Building Ass'n. v. Blaisdell*, 290 U.S. 398, 426; *Schechter v. United States*, 295 U.S. 495, 528.

Due Process—Racial Discrimination

The most pernicious vice inherent in Proclamation No. 3 of the Western Defense Command is that the provisions of it are directed to citizens of Japanese ancestry alone and classifies them with alien enemies. It is a classification based solely on race.

In the brief filed before the Circuit Court of Appeals, the Government said "the distinction is based not on the mere fact that these persons were of Japanese ancestry but on the facts that such persons have cultural and family ties which render it likely that among them will be found the persons who would help this particular enemy which was likely to attack the area in which they resided". This is sophistry run riot. The proclamation is directed not against those who because of family ties might assist the enemies of the United States but against persons of Japanese ancestry.

The Fifth Amendment does not contain an equal protection clause, but this does not mean that there may not be a discrimination of such an unjust character as to bring into operation the due process clause of the Fifth Amendment. *Currin v. Wallace*, 306 U.S. 1, 14. A classical outline of the requirements of due process is found in *Truax v. Corrigan*, 257 U.S. 312, 332:

"The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general laws, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general laws which govern society. *Hurtado v. Cal.*, 110 U.S. 516, 535. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, which the Congress or the legislation may not withhold. Our whole system of law is predicated on the general fundamental plan of equality of application of the law. 'All men are equal before the law', 'This is a government of laws and not of men', 'No man is above the law', are all maxims showing the spirit in which legislators, executives, and courts are expected to make, execute and apply laws."

No discrimination could be more unjust to the individual or more dangerous to the welfare of the coun-

try than one against a particular group of citizens because of ancestry. A claim that the right to so discriminate exists is based on the premise that this is a nation composed of hyphenated citizens from all the countries of the world, and not of Americans. Such discrimination breeds distrust of a Government which proclaims equality but practices inequality. Those who today applaud race discrimination may tomorrow be subjects of it.

All persons within the jurisdiction of the United States shall have the same right in every state and territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to like punishments, penalties, taxes, licenses and exactations of every kind, and no other. 8 U.S.C.A. 41. A law or regulation which forbids citizens of one ancestry or color to do things which citizens of another ancestry or color are permitted to do does not afford due process of law or equal protection of the law. *Buchanan v. Warley*, 245 U.S. 60; *Truax v. Raich*, 239 U.S. 33, 39; *Yick Wo v. Hopkins*, 118 U.S. 356; *Yu Chong Eng, et al. v. Trinidad et al.*, 271 U.S. 500; *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337; *Re Opinion of the Justices*, 207 Mass. 601, 94 N.E. 558. The restraint imposed upon legislation by the due process clauses of the Fifth and Fourteenth Amendments is the same. *Heiner, Collector of Internal Revenue v. Donnan*, 285 U.S. 312, 326; *Coolidge v. Long*, 282 U.S. 582. No duty presses more imperatively

upon the courts than the enforcement of those constitutional provisions intended to secure the equality of each which is the foundation of free government. *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 160.

The case of *Yick Wo v. Hopkins*, *supra*, involved ordinances of the City of San Francisco regulating the location and operation of laundries. Under the ordinances, any persons seeking to operate a laundry were required to obtain a license from a Board of Supervisors. The operation of the Supervisors under these ordinances was such that a large number of Chinese were denied the right to conduct laundries, while people of other nationalities in similar circumstances were granted licenses. In the course of its opinion, the Court said:

(Page 366, 118 U.S.)

"They" (the ordinances) "seem intended to confer and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places but as to persons" . . .

"The power granted to them is not confined to their discretion in the legal sense of the term, but is granted to their mere will. It is purely arbitrary and acknowledges neither guidance nor restraint."

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and

administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the constitution." Pages 373-4.

In Buchanan v. Warley, *supra*, the court said:

"That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights."

The rule which prohibits racial discrimination was succinctly stated in *Re Opinion of the Justices*, *supra*, as follows:

(Page 360, 94 N.E.)

"The fact that a man is white, or black, or yellow, is not a just and constitutional ground for making certain conduct a crime in him when it is considered permissible and innocent in a person of different color."

In a recent case, *Skinner v. Oklahoma*, 316 U.S. 535, 541, in considering the validity of a sterilization law, the court expressed itself on race discrimination. It said: "When the law lays an unequal hand on those who have committed intrinsically the same quality of

offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment".

The Government has heretofore referred to cases such as *Cantwell v. Connecticut*, 310 U.S. 296, *Minnesota v. Probate Court*, 309 U.S. 270, and *Jacobson v. Massachusetts*, 197 U.S. 11, in an effort to show that the curfew proclamation and the evacuation orders which followed it were not manifestly unreasonable and that therefore due process of law was not denied. In the *Cantwell* case, in speaking of the First Amendment to the Constitution, the Court said, "nowhere is this shield¹¹ more necessary than in our country composed of many races and many creeds". The same may be said of the Fifth Amendment. In *Minnesota v. Probate Court*, there was under consideration the validity of a statute providing for the commitment of persons with psychopathic personalities. Full protection was granted to the persons coming within the statutory definition of psychopathic persons by way of hearings, as in insanity cases, and the law was general in its application. In *Jacobsen v. Massachusetts*, the Court was considering a general law requiring vaccinations where an epidemic existed. The inapplicability of these cases seems apparent without argument.

History should have taught us by now, the danger of permitting the military to govern the civil population, so long as the machinery of civil government is

functioning. If the lessons learned from the past are now to be forgotten and the wholesome doctrines of the Milligan case to be abandoned, at least the authority of the military should be confined to the issuance of general regulations applicable to all alike and not discriminatory proclamations such as here involved, which are based upon the false assumption that we are a divided instead of a united people.

CONCLUSION

The writers of this brief are not unaware that here and there among the thousands of American citizens of Japanese ancestry there may be found a few who might betray the land of their birth. Likewise, there undoubtedly are renegades among the alien Germans and Italians and even among American citizens of such ancestry who are permitted to be at large by the same military authority which confines American citizens of Japanese ancestry, and there may be those who would betray this country who can trace their ancestry back through four or five generations of American citizens.

The solution of such a problem, as said in *Buchanan v. Warley, supra*, cannot be promoted by depriving citizens of their constitutional rights. If there are officers of the government who believe that among the American citizens of Japanese ancestry disloyalty is so prevalent that it constitutes a menace to the safety of the country, the question should be brought into

the open, on the floor of Congress and before the people, so that the evidence may be examined, both sides heard and, if the situation requires a remedy, a constitutional one be speedily framed by the representatives of the people. No less should be required when it is proposed to deprive thousands of citizens of their liberties and the consequent loss of property which to many amounts to the savings of years.

The decision of such a question and the application of a remedy, if one is required, should not, and constitutionally cannot, be left to a military commander. History teaches that dictators, whether civil or military, are usually strong, not always wise, and frequently ruthless. Military commanders sometimes forget that they are soldiers. The slur that "a Jap is a Jap" may be often shouted in the hope that repetition may take the place of truth and hide the misery which has been caused and obscure the serious constitutional questions. The curfew law was the first assault on the constitutional rights of American citizens of Japanese ancestry but it was the initial one which led to the disgraceful situation where American citizens are staring through barbed wire barricades on this land of freedom. Recent European history should make plain to us the danger of wholesale proscription.

The appellant's case is not only the case of American citizens of Japanese ancestry, it is the case of all naturalized Americans, the case of all whose parents came to our shores for a haven of refuge. Indeed, it is a protest on behalf of all against racial discrimi-

nation of any kind, for the oppressors of today may be the oppressed of tomorrow. The attack on Pearl Harbor was a great act of treachery which should be repaid in the American way and not by petty acts of injustice or by stripping citizens of their most precious heritage.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 871

MINORU YASUI

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court for the District of Oregon (*R. 13-50*) is reported in 48 F. Supp. 40. The opinion of Judge Denman, dissenting from the certification of questions by the Circuit Court of Appeals is not reported.

JURISDICTION

The certificate of questions of law upon which the Circuit Court of Appeals desired instruction for the decision of this case was filed on March

30, 1943. On April 5, 1943, this Court directed that the entire record be sent to this Court so that the whole matter in controversy might be considered. The jurisdiction of this Court rests on Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The defendant, a person of Japanese ancestry, was convicted under the Act of March 21, 1942, of violation of the curfew order, which is also involved in *Hirabayashi v. United States*, No. 870. The question is whether the curfew measure was constitutional.¹

CONSTITUTION, STATUTES, ORDERS, AND PROCLAMATIONS INVOLVED

The provisions of the Constitution, statutes, orders, and proclamations involved are set forth in Appendices A, B, C, and D to our brief in *Hirabayashi v. United States*, No. 870.

STATEMENT

An indictment under the Act of March 21, 1942, returned in the United States District Court for the District of Oregon on April 22, 1942 (R. 2-6), charged that the defendant, a person of Japanese

¹ The District Court ruled that the measure was unconstitutional as applied to American citizens, but determined that this defendant was not an American citizen. For reasons set forth, *infra*, we do not support the conviction on that ground.

ancestry born at Hood River, Oregon, and residing in Portland, Oregon, was not within his place of residence between the hours of 8 P. M. and 6 A. M. on or about March 28, 1942, contrary to Public Proclamation No. 3, effective after 6 A. M. on March 27, 1942, for all persons of Japanese ancestry, and that the defendant knew or should have known of the restriction involved.

Upon the trial before the court, a jury having been waived (R. 10), the Government proved and the defendant did not deny the facts establishing that the offense had occurred. The defendant took the stand as a witness in his own behalf and testified that he was born on October 19, 1916, at Hood River, Oregon (R. 148); that his father was a merchant and engaged in farming and his mother was a housewife (R. 151); that in July 1925, when he was about 8 years of age, he took a summer vacation trip to Japan and returned in September 1925 (R. 151); that he attended grammar school and high school in Hood River and received his Bachelor of Arts degree from the University of Oregon in 1937 and his Bachelor of Laws degree in 1939 at the age of 23 years (R. 153-154). He testified that after passing the bar examinations and admission to the bar in September he practiced law both in Hood River and for a short while in Portland (R. 155). His father wrote a letter to the Japanese Consul General in Chicago stating that he had graduated

from law school and recommending him for a position; the defendant also secured letters of recommendation from Dean Wayne L. Morse of the Oregon Law School and from other people in Hood River (R. 155). He stated that in connection with this position which he entered upon in April 1940 he took no oath of allegiance (R. 157). He stated that his duties were to prepare correspondence for the Consul's approval and on various occasions he attended meetings of civic organizations to explain the position of Japan in the Far East (R. 158). He testified that on December 8, 1941, he resigned his position in which he was paid \$125 a month "Because I felt that as a loyal American citizen I could not be working for the Japanese Consulate after the declaration of war" (R. 159, 160). A telegram from the defendant's father dated December 8, 1941, at 1 A. M., introduced into evidence, read as follows: "As war has started your country needs your service as a United States reserve officer. I as your father strongly urge you to respond to the call immediately" (R. 161). On the same date the defendant, a Second Lieutenant in the Army of the United States, Infantry Reserve, telegraphed to the military authorities offering his immediate services. On the same date his telegram was acknowledged by the military authorities who suggested he hold himself in readiness for military call to active duty. (R. 84.) In

response to another telegram from the defendant the military authorities replied on December 11, 1941, that the "effective date or details regarding your active duty not yet determined stop await further instructions" (R. 85). A letter of March 28, 1942, from the military authorities to the defendant advised him that a defect in vision of the right eye was waived for limited service and he was retained in the infantry reserve for eligibility for limited service only (R. 86, 167).

Defendant testified that after his return to Chicago from Hood River on January 12, 1942, he discussed with Special Agent Ray Mize of the Federal Bureau of Investigation the question of testing the constitutionality of the curfew and the possibility that such a test would cause public resentment or more stringent regulations (R. 169-170.) Defendant further testified that he took an oath of allegiance to the United States in December 1937 upon the completion of his R. O. T. C. course at the University of Oregon and that he never intended to, and to the best of his knowledge never did, renounce his American citizenship or express allegiance to any foreign sovereign (R. 173-174.) He testified that his father was at Camp Livingston, Louisiana, an Army camp for interned alien enemies (R. 175).

On cross-examination the defendant testified that his parents taught him to speak Japanese; that he attended a Japanese language school for

about three years while he was attending grammar school to learn to read and write Japanese (R. 176-177). He stated that he and his parents were members of the Japanese Methodist church (R. 178). Defendant admitted that he was aware that his father had received recognition by the Japanese Government for work he had done in promoting better relations between Japanese and Americans in the Hood River Valley (R. 181-182). He stated that he was employed by the Consul General in Chicago and was registered with the Secretary of State by the Consulate as one of its employees (R. 179). About once a month he delivered a speech on a topic suggested by the Consul General which he would write in English and then have the speech approved by the Consul General (R. 183). Some of the speeches brought forth the view which the Japanese Government wished to be presented to the American people on the war with China (R. 188-189).

On redirect examination the defendant testified that he attended the Japanese School on Friday afternoon and Saturday morning; that his father was active among the white people of the community as a member of the Rotary Club and as Director of the Apple Growers' Association, the biggest fruit cooperative in the region (R. 190); that through the efforts of his father and people like him the community, in which there had been anti-Japanese feeling in 1906, settled down to

a normal peaceful community in which Japanese and American farmers cooperated with each other (R. 191).

On examination by the court defendant testified that his people were Methodists, that he did not know the precepts of the Shinto religion and it was not practiced in his home (R. 194-195); that he did not accept the concept of the divinity of the Japanese Emperor (R. 195); that if he were on active duty he would have obeyed the curfew regulation but that as private citizen, although a reserve officer, he thought the regulations were not constitutional (R. 198).

The Government made an offer of proof of the testimony of the secretary and business agent of the Lumber and Sawmill Workers of Local No. 3 of Portland, containing about 2,200 members, to establish that prior to the promulgation of General DeWitt's regulations circumstances and incidents had occurred which threatened riots and danger to the Japanese population and disruption of war industry on the West Coast (R. 201-206). The defendant's objection to this testimony was sustained. The Government also offered to prove by an educator who lived in the Orient and was familiar with Japanese people the results of his studies of the Japanese, both alien and American-born, and the ideals, culture and type of loyalty of Japanese under the circumstances of the war between Japan and the United States. The de-

fense objected on the ground that such evidence would not be binding upon the defendant. The court stated that he would exclude the general offer. (R. 206-207.) The United States Attorney replied that the witness did not know the defendant but would testify concerning the Japanese culture and religion both in America and Japan. The court replied that he had no interest in the matter but that the prosecution could call the witness if it wished. Thereupon the Government did not press the matter but rested. (R. 207-208.)

The court concluded that although the curfew was unconstitutional as to American citizens, the defendant at his majority had elected allegiance to the Emperor of Japan rather than citizenship in the United States and found the defendant guilty as charged (R. 12, 50). On November 18, 1942, the court sentenced the defendant to the maximum punishment provided by the statute, \$5,000 fine and a year of imprisonment (R. 52).

ARGUMENT

Unlike *Hirabayashi v. United States*, No. 870, which involves both the evacuation and the curfew measures, this case involves only the curfew. Our contentions in support of both these measures are set forth in detail in our brief in the *Hirabayashi* case, and we therefore respectfully refer the Court to that brief for a full statement of our position.

The District Court ruled that the statute was unconstitutional as applied to American citizens but that the defendant herein, by reason of his course of conduct, must be deemed to have renounced his American citizenship. We do not undertake to support the conviction on that ground. No such issue was tendered by the Government, and although it is true that the defendant testified that he had not renounced his citizenship (R. 172-173), we do not believe that the issue of loss of citizenship was in controversy. In these circumstances, we do not ask the Court to accept the ruling of the District Court with respect to citizenship, wholly apart from the question whether American citizenship can in general be renounced in the manner indicated (cf. *Perkins v. Elg*, 307 U. S. 325) and wholly apart from the possible applicability of the Nationality Act of 1940 (c. 876, 54 Stat. 1137; U. S. C., Tit. 8, Sec. 501, 801 *et seq.*) which undertakes to set forth the exclusive methods whereby citizenship may be lost.²

² Section 401 of the Nationality Act of 1940 specifies certain types of conduct by which United States nationality may be lost. Section 403, however, provides that expatriation by this conduct, with certain exceptions not here involved, cannot occur while the national is in the United States. Section 408 provides that the loss of nationality under the Act shall result solely from the performance of the acts specified in the statute.

CONCLUSION

The conviction should be affirmed on the ground that the curfew measure was valid as applied to all persons of Japanese ancestry.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

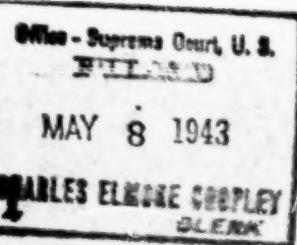
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MAY 1943.

FILE COPY



**In the Supreme Court
OF THE
United States**

OCTOBER TERM, 1942

No. 871

MINORU YASUI,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

**BRIEF FOR NORTHERN CALIFORNIA BRANCH OF
THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE.**



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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 871

MINORU YASUI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR NORTHERN CALIFORNIA BRANCH OF
THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE.

This is an appeal prosecuted by the appellant from a judgment of conviction followed by a sentence to one year of imprisonment and the imposition of a \$5000.00 fine rendered and entered against him by the United States District Court in and for the District of Oregon, sitting without a jury, in a criminal case arising out of an indictment charging him with the commission, on March 28, 1942, of a misdemeanor under the provisions of Public Law No. 503 in that

he violated the curfew regulation imposed upon him as a person of Japanese ancestry by the provisions of Public Proclamation No. 3 promulgated by General DeWitt. The written opinion of the District Court appears in the record herein at pages 13 to 53. The case comes before this Court on a certificate of questions of law upon which the Circuit Court of Appeals for the Ninth Circuit desires instruction for the proper decision of the cause.

Statute and Proclamation the Validity of Which Are Involved.

1. *Public Law No. 503*, 77th Congress, 2nd Session, Chap. 191, H.R. 6758, approved March 21, 1942, and now codified as Title 18 *U. S. Code*, sec. 97a, the validity of which is involved herein, reads as follows:

“Whoever shall enter, remain in, leave, or commit any act in any military area or military zone which has been prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense.”

2. *Public Proclamation No. 3*, promulgated March 24, 1942, by J. L. DeWitt, Lieutenant-General, U. S.

Army, commanding the Western Defense Command and Fourth Army, the validity of which is involved herein, imposed "curfew" regulations upon the appellant as a person of Japanese ancestry, prohibited him from traveling beyond a distance of five miles from his residence and denied him the right to the possession, use and enjoyment of certain articles of personal property, to-wit, weapons, radios, cameras, signal devices and sundry other articles. This proclamation is set forth verbatim in *7 Fed. Reg.* 2543 and also at pages 330 and 331 in *House Report No. 2124* of May 1942 as authorized by House Resolution 113 of the 77th Congress, 2nd Session.

STATEMENT OF THE CASE.

The appellant was born in Hood River, Oregon, of Japanese parents on October 19, 1916. (R. 77, 120, 148.) Hood River is his domicile and residence. His father was a Hood River merchant and his mother a housewife. (R. 149-151.) He and his parents are Methodists. (R. 178.) He was taken to Japan for a visit during a summer vacation when he was eight years of age. (R. 151, 182.) He graduated from a public grammar school and high school in Hood River. (R. 153-154) He studied the Japanese language in a Japanese language school for three years. (R. 176-177.) He graduated from the University of Oregon in arts and letters in June of 1937, receiving a bachelor of arts degree. (R. 154.) He was then 20 years 7 months of age. He received his commission as a sec-

ond lieutenant in the U. S. Army Officers Reserve Corps upon completion of his R.O.T.C. course and took his *oath of allegiance* to the United States in December, 1937, after attaining his majority and when his age was 21 years 2 months. (R. 174.) (The opinion of the Court below (R. 48) erroneously states this occurred during his minority and that by reason thereof was not evidence of his election to accept citizenship in the United States.) Thereafter, he graduated from the University of Oregon Law School, receiving his bachelor degree in law in June of 1939 at the age of 22 years 8 months. (R. 154, 174.) He is a registered voter and has voted in elections. (R. 154.)

After taking the bar examination in the interval between June and August of 1939 he worked on his father's farm and upon notification in September of 1939 that he had successfully passed the examination he practiced law for a short time in Hood River and then in Portland. (R. 155.) He must also have taken an oath of allegiance to the United States when he was admitted to the bar. Upon the recommendation of his father, Dean Wayne L. Morse of the Oregon Law School, several university officials (R. 171) and other persons in Hood River and Portland he obtained employment in the office of the Consulate General of Japan at Chicago in April of 1940. (R. 151-156.) His tasks there were those of a general secretary in charge of correspondence (R. 157) and later as a public relations man. (R. 133, 137.) He received a salary of \$125.00 per month. (R. 157.) As a part of his employment he made speeches before public bodies. A few

of these speeches concerned the Sino-Japanese war and explained the Japanese position thereon. (R. 158, 159, 171, 183-185, 189.) While so employed among other American employees (R. 188) he was twice registered as an employee with the Department of State pursuant to regulations. (R. 81, 105, 106.) The certificates of registration appear at record pages 58 and 113.

Sometime during the day or evening of December 7, 1941, the appellant first heard of the Japanese attack on Pearl Harbor. (R. 159.) He resigned his position on December 8, 1941, because he was a loyal American. (R. 160.) On December 8, 1941, Congress declared war on Japan. On the same day the appellant tendered his services to his country, to Headquarters, Second Military Area, at Portland, by telegram (R. 162) and received a letter bearing said date in response instructing him to hold himself in readiness for an early call to active duty. (R. 162 and 84.) He received a telegram from his father on December 8th urging him to offer his services to his country. (R. 160, 161.) Thereafter, on March 28, 1942, appellant violated the curfew restrictions imposed upon American citizens of Japanese ancestry by Public Proclamation No. 3 promulgated on March 24, 1942, by General DeWitt. (See 7 F.R. 2543.) He surrendered himself to the Portland Police Department on March 28, 1942, for the purpose of testing the constitutionality of this discriminatory curfew regulation (R. 111), was taken into custody (R. 95, 96, 99) and was thereafter indicted under Public Law No. 503 (18 U.S.C.A., sec. 97a) for a violation of the proclamation.

Questions Involved.

1. Is Public Law No. 503 void for uncertainty in failing to prescribe definite military areas and in failing to specify the particular restrictions upon the activities of persons therein?
2. Is the statute unconstitutional and void as delegating to Courts and juries the legislative power to determine what acts thereunder shall be deemed to be criminal and punishable?
3. Is the statute unconstitutional and void as an attempt to delegate to executive and administrative officers legislative power to be exercised *in futuro* in prescribing military areas of unlimited geographical extent and restraints of an unknown nature upon persons therein?
4. Is the statute as applied to appellant herein and to all American citizens of Japanese ancestry, in enforcing the provisions of Public Proclamation No. 3, to the exclusion of citizens of other racial origin, unconstitutional and void as abridging the fundamental rights and liberties of American citizens safeguarded by the U. S. Constitution and amendments thereof and especially by the 5th Amendment?
5. Are the statute and proclamation void because of the inseverability of their void features?
6. Can the appellant judicially be declared an alien enemy in a judgment of conviction where the indictment admits and alleges his citizenship?
7. Can the appellant judicially be declared an alien enemy despite the fact that he is a native-born citizen

of this country and a national thereof, residing and domiciled here, and entitled to all the constitutional rights, liberties, privileges and immunities of national and state citizenship by virtue of the 14th Amendment and the Nationality Law when there is not a scintilla of evidence in the record that he has lost citizenship or nationality under any of the methods prescribed by the nationality and expatriation laws of this country or by any other legally recognized method whatever?

ARGUMENT.

THE STATUTE IS VOID FOR UNCERTAINTY.

Public Law No. 503, 18 U.S.C.A. 97a, is void for uncertainty on its face in failing to prescribe specific military areas and specific restrictions upon the activities of persons within the confines of the military areas. See 59 *Corpus Juris* 601, sec. 160 and cases there cited. It is also unconstitutional and void as a delegation by Congress of legislative power to Courts and juries to determine what areas are military areas and what acts of persons committed therein shall be decided to constitute criminal acts and be punishable thereunder. *U. S. v. L. Cohen Grocery Co.*, 255 U.S. 81. The statute was enacted and became effective on March 21, 1942, and Public Proclamation No. 3, a military regulation which it would enforce, was promulgated three days later on March 24, 1942. It is, therefore, also void for uncertainty as attempting to adopt, by reference, legislative orders of executive or military officials which are not *in esse* but are un-

known, indeterminate and to be prescribed *in futuro*. *Schechter Poultry Co. v. U. S.*, 295 U.S. 495, 55 S. Ct. 837; 16 *Corpus Juris Sec.*, pp. 349, 352; and *Ex parte Burke*, 190 Cal. 326, 328.

THE STATUTE AND PROCLAMATION ARE VOID AS ABRIDGING FUNDAMENTAL CONSTITUTIONAL PROVISIONS.

The statute is unconstitutional and void in giving effect to military orders which usurp legislative and judicial functions in violation of *Article I*, Secs. 1 and 8, cl. 18, and *Article III* of the federal *Constitution*. Congress cannot delegate legislative power to the president or executive officers. *Field v. Clark*, 143 U.S. 649, 652. Congress is empowered to delegate a mere *limited discretionary authority* to executive officers where it first sets up in a statute a standard, rule or policy for the guidance of such officials and lodges in them the making of subordinate rules, in aid of the enforcement of the statute, and leaves to them the determination of facts to which the policy declared in the statute is to apply. The subordinate rules these officials may make must be confined to the limits prescribed by the statute. *Schechter Poultry Corp. v. U. S.*, supra; *Panama Refining Co. v. Ryan*, 293 U.S. 388. Congress has not attempted to validate Public Proclamation No. 3 and could not validate it because it does not pretend to be the product of a limited discretionary authority conferred upon its promulgator by Congress but to be a product of usurped legislative power that can be wielded only by Congress and not by a military commander.

Public Proclamation No. 3 was promulgated, according to a recital contained therein, under an asserted theory of military necessity. It has been applied, in conjunction with the statute herein as its enforcement procedure, to the appellant and other citizens of Japanese ancestry engaged in civilian walks of life within the geographical limits of the mainland United States in a region outside a theater of war and in the absence of a proclamation of martial law by Congress and in an area free from martial rule. The statute and the proclamation are void, therefore, under the rules established in *Ex parte Milligan*, 4 Wall. (U.S.) 2, in that they would suspend the federal Constitution and destroy the fundamental civil liberties it safeguards to citizens and also to those aliens unaffected by the *Alien Enemy Act*, 50 U.S.C.A., Secs. 21-24.

The proclamation and the statute which would enforce its curfew regulations, travel restrictions and property deprivations are void as deprivations of liberty and property without due process of law in violation of the 5th Amendment. These regulations and restrictions abridge *freedom of movement* and other *inherent rights vital to the maintenance of our democratic institutions*. See *Crandall v. Nevada*, 6 Wall. 35, 48-49; *Williams v. Fears*, 179 U.S. 279; *Edwards v. California*, 314 U.S. 160; and *Schneider v. Irrington*, 308 U. S. 147, 161, discussing these rights. These constitutional rights also inhere in aliens (*Truax v. Raich*, 239 U.S. 33, 39) but are subject to suspension in the case of *alien enemies* during wartime under the *Alien Enemy Act*. This Act has not, however, been invoked

by Public Proclamation No. 3 which derives its authority, if any it has, from Executive Order No. 9066 (7 F.R. 1407) which asserts its own authority not under this Act but upon constitutional grounds which are nowhere to be found in the Constitution. The proclamation and statute as applied to aliens outside the provisions of said Act are illegal and void.

The proclamation is also unconstitutional in that it discriminates against and denies to citizens of Japanese pedigree the possession, use and enjoyment of the private articles of personal property it forbids to them or compels them to confiscate under an asserted claim the deprivation or confiscation is for a public use or benefit. This is a taking of private property for public use without just compensation as well as a deprival of property without due process of law in violation of the *5th Amendment*. (*Smith v. Brazelton*, 1 Heisk. (Tenn.) 44, 2 Am. Rep. 678; 67 *Corpus Juris Sec.*, pp. 373 and 376.) The proclamation is also void as infringing the right to keep and bear arms which is guaranteed by the *2nd Amendment*. If all our citizens were to be deprived of this right by military fiat how would the people protect our Constitution and form of government in the event of any attempt at a coup d'etat on the part of fascist-inclined leaders who might arise and seek to overthrow our government and establish a dictatorship. The sole protective weapon that would remain in the hands of the people would be the right to strike in an effort to paralyze industry and stop the distribution of goods. This weapon, however, would have no guarantee of success if it is to be measured by the numerous historical

failures of peoples to prevent the capture of power by dictators. If the early colonists had been disarmed pursuant to military fiats emanating from the Crown in the early days of 1775 this Republic would never have been founded.

Congress is not empowered to discriminate against citizens on a color or race origin basis and, consequently, the proclamation and statute are both unconstitutional and void as depriving appellant of his liberty and property without due process of law and as denying to him the equal protection of the laws in violation of the 5th Amendment. *U. S. v. Yount*, 267 Fed. 861; *Sims v. Rives*, 84 Fed. (2d) 871, cert. den. 298 U.S. 682; *Wallace v. Currin*, 95 Fed. (2d) 856, 867; *Currin v. Wallace*, 306 U.S. 1, 14; *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 55 S. Ct. 758; and compare, *Buchanan v. Warley*, 245 U.S. 60, 38 S. Ct. 16; *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 46 S. Ct. 619, 625, 627. The operation of the 5th Amendment is not suspended by war. (*U. S. v. L. Cohen Grocery Co.*, 255 U.S. 81.) Constitutional rights cannot be abrogated in wartime under a plea of military necessity except in a theater of war where the conflict rages and necessarily prevents the civil authorities from operating. (*Ex parte Milligan*, supra.) The proclamation and statute interfere with the constitutional rights and liberties of the appellant and other citizens of like racial extraction outside a theater of war and in the absence of martial law and rule and, in consequence, are void under the *Milligan* decision. If the contents of the proclamation are not either directly or indirectly authorized by

the Alien Enemy Act it is also void as to alien enemies for the same reasons. Alien enemies who are not hostile to us have rights safeguarded by the Constitution. (*Ex parte Kumezo Kawato*, 87 L. Ed. 94, 95.) The plea that *military necessity* or *national crisis* justifies the suspension of constitutional rights by executive officials was repudiated in the *Milligan* case and rejected in *Schechter Poultry Co. v. U. S.*, 295 U.S. 495, 55 S. Ct. 837 at 842, where this Court declared:

“Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment * * *.”

The proclamation and the statute demonstrate that executive officials and Congress are not always protectors of the rights of minorities. It is to our Courts that we must look finally for the protection of the rights and liberties of minorities as observed in *Chambers v. Florida*, 309 U.S. 227, where it is stated:

“Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.”

CITIZENS ARE NOT ALIEN ENEMIES.

Public Proclamation No. 3 treats American citizens of Japanese ancestry as alien enemies. These citizens constitute a law-abiding part of our citizenry. They have as much at stake in this country and nation as any other segment of our citizenry. Without justification and without right the proclamation labels them suspects, disloyal and criminals. Never before in our history have innocent citizens been so treated because of the geographical origin of their ancestors. It engendered fear in them. By reason of the precedent it would establish it compels a whole nation to stand in awe of our military commanders and in fear of incurring their displeasure. Our history reveals that we have been wont to hold our military commanders and government officials in high esteem and to regard them with affection. It is startling to learn that citizens must fear their own protectors. Those who had a hand in fanning the flames of race-hatred against these citizens by dictating this discriminating policy to be enforced against them by the Army regard American citizenship very lightly when it concerns the rights of others. The proclamation herein was the prelude to the banishment of the appellant and these citizens from the Pacific States. Following the proclamation a series of exclusion orders termed *Civilian Exclusion Orders* were issued by General DeWitt commanding the Army to remove them from their homes to civil control stations from whence they were temporarily deposited in assembly centers and held in military custody. (See first series of these orders in H.R. 2124, p. 332 et seq.) Thereafter, under the

compelling points of bayonets and threats of prosecution under Public Law No. 503 for disobedience, they were driven into *concentration camps* inland where they are now imprisoned behind barbed wire while armed military police patrol the camps to prevent the internees from escaping. Through the medium of these military orders these citizens have been denied all of the privileges that flow from national citizenship. Their constitutional rights have been destroyed. Their properties have been lost to them. Their liberties have been denied to them. Their livelihood has been rendered precarious. Their hopes have been shattered. Their future is uncertain. The whole terrible scheme of these sweeping military proclamations, orders and actions is challenged herein and is subject to review by this Court. *Lovell v. Griffin*, 303 U.S. 444; *Thornhill v. Alabama*, 310 U.S. 88.

Strange Treatment of Patriotic Citizens.

At the time the proclamation was issued there were over 5000 American youths of Japanese ancestry serving alongside their white brothers in our armed forces which were spread over the face of the earth and defending all the great libertarian principles and ideals of equality for which this Republic stands. Thousands of others were serving in the Hawaiian Territorial Guard. The induction of additional numbers of these American youths was interrupted for a short period of time during which those arriving at serviceable age were temporarily classified as 4c under the Selective Service Act. The reason for this policy has never been publicly explained. It would be strange

that any officials or politicians should take it upon themselves to tell these American youths who were clamoring to fight for their country that they could not do so. This country belongs to these youths as much as to any other citizens. They cannot be discriminated against and be deprived of their birthright to defend this country by arbitrary governmental action. Our government exists for the benefit of the citizens of this Republic and not for the benefit of government officials who are their agents and ought not to lose sight of the fact. On January 28, 1943, Mr. Henry L. Stimson, Secretary of War, reversed this unwarranted policy, and announced that these youths would be absorbed into service. As quoted in the *San Francisco News* of January 28, 1943, on page 1, Mr. Stimson is reported to have stated:

“It is the inherent right of every faithful citizen, regardless of ancestry, to bear arms in the nation’s battle. When obstacles to free expression of that right are imposed by emergency considerations, those barriers should be removed as soon as humanly possible. Loyalty to country is a voice that must be heard, and I am glad that I am now able to give active proof that this basic American belief is not a casualty of war.”

If this responsibility which attaches to citizenship is an *inherent right* of every American citizen are not the other rights, privileges and immunities of citizenship also inherent in these citizens and exercisable by them without interference by military officers?

President Roosevelt, under whose Executive Order No. 9066 these proclamations and exclusion orders

assert their authority, has made a number of public announcements that no citizen should be discriminated against in his employment by reason of race or color. He has also declared that no American citizen of Japanese ancestry should be denied the right to exercise the responsibilities of citizenship. His public utterances indicate that he was not aware that any of his military commanders intended to use his Executive Order No. 9066 as a pretext to issue orders of this type. Judged by its context his order does not suggest that it was intended to be applied in a discriminating fashion. Neither does Public Law No. 503 which was presented to him for approval before it became effective indicate on its face that it was to be applied to citizens on a race origin basis. A scrutiny of the order and the statute would not have revealed they were to be applied on a race discrimination basis. In a letter addressed to the Secretary of War, which was published in Vol. III, No. 12, of the *Manzanar Free Press*, a weekly published in one of these concentration camps on February 10, 1943, the President wrote:

“The White House
Washington
February 1, 1943.

My Dear Mr. Secretary:

The proposal of the War Department to organize a combat team consisting of loyal American citizens of Japanese descent has my full approval. The new combat team will add to the nearly five thousand loyal Americans of Japanese ancestry who are already serving in the armed forces of our country.

This is a natural and logical step toward the reinstitution of the Selective Service procedures which were temporarily disrupted by the evacuation from the West Coast.

No loyal citizen of the United States should be denied the democratic right to exercise the responsibilities of his citizenship, regardless of his ancestry. The principle on which this country was founded and by which it has always been governed is that Americanism is a matter of the mind and heart; Americanism is not, and never was, a matter of race or ancestry. A good American is one who is loyal to this country and to our creed of liberty and democracy. Every loyal American citizen should be given the opportunity to serve this country wherever his skills will make the greatest contribution—whether it be in the ranks of the armed forces, war production, agriculture, government service, or other work essential to the war effort.

I am glad to observe that the War Department, the Navy Department, the War Manpower Commission, the Department of Justice, and the War Relocation Authority are collaborating in a program which will assure the opportunity for all loyal Americans, including Americans of Japanese ancestry, to serve their country at a time when the fullest and wisest use of our manpower is all-important to the war effort.

Very sincerely yours,
Franklin D. Roosevelt."

It would seem to follow that if the *responsibilities* of citizenship should not be denied because of one's ancestors the rights and liberties which attach to citi-

zenship should not be denied because of the old nationalities of one's ancestors.

There are now approximately 20,000 of these American youths of Japanese ancestry serving in our armed forces, a large percentage of whom were volunteers. It is probable that at the time of the Pearl Harbor attack every family of Japanese blood in this country and subject to our jurisdiction had a member serving in our armed forces. The accuracy of this statement would not be doubted today in view of the total number now serving. Does this creditable number of youths in service then and now not prove beyond the shadow of a doubt that these youths are patriotic, loyal and devoted to this country and nation? Does it not constitute an irrefutable argument that their families then were and still are loyal and willing to do their share to contribute to the inevitable victory over our enemies? The bombs our Japanese enemies rained on Hawaii fell alike on our aliens and citizens resident there and destroyed many of them and much of their property. Is it any wonder that our American citizens of Japanese ancestry there and on the mainland here clamored to get into service to destroy our enemies? Is it any wonder that our alien Japanese resident there and here whose friends and relatives were high among the casualty lists in Hawaii and whose sons are in our armed forces are devoted and loyal to this country and willing to contribute their services and do what they can to defend America and to defeat our enemies? These aliens are grateful to America. They abandoned Japan to escape

from the jurisdiction of a military feudalism and oppressive government. They sought the refuge of America and the protection of American democracy. In the face of these facts who would dare charge disloyalty on their part and that of their children to America?

The restrictions imposed by Public Proclamation No. 3 on Italian alien enemies were lifted by General DeWitt on October 29, 1942, and those imposed upon German alien enemies were lifted by him on December 24, 1942. He has not, however, released American citizens of Japanese descent from the restrictions thereby imposed upon them. He does not view them as being citizens or as being entitled to exercise the rights of citizenship as evidenced by his statements hereinafter quoted. He regards them as hostile alien enemies. His views regarding them and his treatment of them are opposed to the views of the President as expressed in the presidential letter hereinabove quoted verbatim and to the oral statement of the Secretary of War hereinabove quoted. It is to be recalled that until recently General DeWitt's orders prohibiting these citizens from Western States were applied by him even to uniformed American soldiers of Japanese ancestry who, while on furlough, sought to visit members of their families or friends in the areas forbidden by him. On April 19, 1943, General DeWitt, by Public Proclamation No. 17 permitted American soldiers of Japanese ancestry freedom of movement in the prohibited areas.

No military necessity existed justifying the destruction of the constitutional rights and liberties of the appellant and a small fragment of our citizenry upon the basis of the nationality of their progenitors. Inasmuch as Public Proclamation No. 3 ostensibly stems from Executive Order No. 9066 it was designed to protect against espionage and sabotage to national defense material, premises and utilities as defined in 50 U.S.C.A. 104, which was the declared purpose of the executive order. Such prohibited acts and a conspiracy to commit them are felonies punishable by 30 years imprisonment and \$10,000 fine under 50 U.S.C.A. 101. Had the appellant been guilty of any such criminal acts he would have been prosecuted for a violation of that statute which is entitled, "*Willful Destruction Of War Or National Defense Material*" and not for a violation of Public Law No. 503, which is a mere misdemeanor.

The Prosecution Did Not Sustain Its Burden of Proof.

At the trial below all that the prosecution proved was that the appellant was in an area where, under the Constitution, he had a lawful right to be just as much as any other citizen residing therein and that he was exercising only those rights common to all other citizens residing therein. The burden of proving the elements of a crime rests upon the prosecution. This burden was not sustained in the trial Court. The government did not offer any evidence of facts justifying, or in anywise supporting, the application of Public Proclamation No. 3 or of Public Law No. 503 to him. If it could have introduced into evidence

any factual basis therefor it would have done so. If it could have proved any criminal act upon the part of the appellant it would have done so. Its failure in these respects raises a conclusive presumption that it was unable so to do. It is bound by the record.

Where military action abridges fundamental constitutional rights it is incumbent upon the prosecution to establish by evidence in a criminal proceeding instituted for a violation of a military regulation that the action of the military authority was taken in good faith against a defendant engaged as a participant in an actual rebellion or insurrection. It must also prove that the military action so taken was taken in the honest belief that it was essential to quell such a disturbance. It is only in cases of insurrection that a military commander "*is permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order.*" Such measures, however, must be "*conceived in good faith, in the face of an emergency, and directly related to the quelling of the disorder or the preventing of its continuance.*" Proof of these factual evidentiary matters are not conclusively supported by "*mere executive fiat*". *Sterling v. Constantin*, 287 U.S. 378; *Moyer v. Peabody*, 212 U.S. 78. The prosecution, at the trial below, did not offer any evidence seeking to justify the application of the restrictions of Public Proclamation No. 3 to the appellant. It is obvious that it couldn't do so. The appellant was not engaged in any unlawful act. He was not engaged in any insurrection or rebellion. Neither were any

of these citizens who were affected by the proclamation. The action of the military commander taken under the proclamation was not taken to quell any violence, insurrection or rebellion. It was taken against innocent citizens and not against hostile forces or groups.

General DeWitt was doubtlessly influenced by the propaganda directed against the Japanese residents here during January of 1942, and probably entertained an opinion that danger might arise from the ranks of the Japanese aliens. A possibility of danger existed from German and Italian alien enemy sources against whom, however, the General took no like blanket action. Evidently he is suspicious of all Japanese aliens and Americans of Japanese descent. Mere suspicion, however, is a product of the imagination and has not yet been elevated to the dignity of evidence. In the *San Francisco News* and other San Francisco newspapers of April 13, 1943, General DeWitt was quoted as having testified on that date before a House naval affairs subcommittee hearing held in San Francisco, in part as follows:

“I don't want any Jap back on the Coast.

“There is no way to determine their loyalty.

“It makes no difference whether the Japanese is theoretically a citizen—he is still a Japanese. Giving him a piece of paper won't change him.

“I don't care what they do with the Japs as long as they don't send them back here. A Jap is a Jap.”

The statements indicate a bare assumption upon his part not that these citizens are disloyal but that it is impossible to determine their loyalty from which it must be inferred he made no attempt to ascertain whether or not they were loyal. Apparently he does not apply the same line of reasoning to European alien enemies in his district or to their citizen issue or to other citizens who may be inimical to our welfare. His statements indicate quite clearly that he does not regard the native-born of Japanese descent to be citizens despite the provisions of the 14th Amendment. The native-born do not receive a "piece of paper" conferring citizenship upon them. The alien Japanese do not receive a certificate of naturalization because they are ineligible to citizenship. That citizenship papers could be considered mere pieces of paper is a strange undemocratic conception. The statements indicate that the drastic military orders were issued because of a prejudice harbored against these citizens of Japanese extraction and that it was prejudice and not military necessity that evoked them. Suspicion existing in a few minds does not raise a presumption of disloyalty on the part of these citizens and does not constitute a factual basis justifying drastic military measures depriving them of their properties and denying them of their liberties. The slant of one's eyes, the color of one's skin and the old geographical origin and nationality of one's ancestors may give rise to suspicion on the part of the prejudiced and the uninformed but they have no bearing on the question of one's loyalty.

THE STATUTE AND PROCLAMATION ARE WHOLLY VOID BECAUSE OF THE INSEVERABILITY OF THEIR VOID PARTS.

In its opinion the District Court declared that, as the statute attempts to classify citizens upon a color or race basis and "to apply criminal penalties for a violation, founded upon that distinction, the action is insofar void." (R. 45.) It also declares that aliens are entitled to the "equal protection of the laws" in ordinary times but not in times of war. (R. 45.) This conclusion is not entirely correct for alien neutrals are entitled to this protection at all times. Alien enemies are likewise entitled to this protection except when the *Alien Enemy Act* is invoked against them. See *Ex parte Kumezo Kawato*, supra.

The District Court expressly decided that the orders of General DeWitt "*were void as respects citizens*" and "*valid with respect to aliens*." (R. 46.) The statute, however, imposes its prohibitions upon all persons inasmuch as it uses the generic word "*Whoever*". Executive Order No. 9066 authorizes the removal of "*any and all persons*" from military areas. The proclamation expressly applies to "*all alien Japanese, Germans, and Italians and all persons of Japanese ancestry*" within Military Area No. 1. The statute and proclamation apply to *all persons* whether citizens or aliens and, in consequence, are entirely void because the respective parts of each are inseparably connected and are not severable so as to apply to alien enemies to the exclusion of alien neutrals and citizens. The opinion of the District Court is, therefore, erroneous and the judgment void. See *Railroad Retirement*

Board v. Alton R. Co., 295 U.S. 330, 55 S. Ct. 758, 767, and rules and cases cited in 59 *Corpus Juris*, p. 639, Sec. 205, relating to severability.

The inseverability of the void features of the statute and of the proclamation invalidates their application to alien enemies also. It is not unlikely, however, that the action applied by the proclamation against alien enemies which cannot be sustained under it might yet be sustainable under the theory that the action was taken pursuant to an oral command of the President authorized by the *Alien Enemy Act*. If such a command was given it has not been reported. The President invoked the *Alien Enemy Act* in Public Proclamations Nos. 2525, 2526, 2527 and 2537 and in Executive Order No. 9095 in matters involving alien enemies. See *H. R.* 310 to 315. Alien enemies are not, however, punishable under the statute herein which is void for the foregoing reasons. The trial Court's judgment that the appellant was an alien enemy amenable to the statute was erroneous because of the invalidity of the statute as well as for the reason the appellant was and is a citizen.

**THE STATUTE AND PROCLAMATION DENY LEGAL
EQUALITY TO CITIZENS.**

The statute and proclamation discriminate against American citizens of Japanese ancestry to the exclusion of citizens of other ancestral derivation and therein do violence to the fundamental principle of legal equality upon which this nation was established.

Citizenship is not a divisible thing: it is not a thing of degrees. It is a status of legal equality. A few of our native-born whites suppose they derive citizenship from the mere fact they are members of a white race but they are mistaken. They derive it from the 14th Amendment which confers citizenship upon all those who have the good fortune to be born here regardless of their race, color or creed. The discrimination against these citizens on the basis of the geographical origin of their ancestors attempts to divide our citizenry and set up classes of citizens and degrees of citizenship. In effect it asserts the supremacy of the citizens of Anglo-Saxon, Mediterranean and African stocks in the United States under the theory they are citizens either of the pure white race or the pure black race for whom full citizenship rights are preserved. These stocks never represented races however. They represent old Continental nationalities of peoples of diverse geographical origin who for a while inhabited Europe and its isles, the Mediterranean coast and Africa and were subject to various European and African rulers. Legal equality inheres in citizenship, is an attribute of liberty and the heritage of every American citizen regardless of the geographical origin, color and creed of his forebears and is safeguarded by the 5th and 14th Amendments and by the privileges and immunities clause of the latter and Sec. 2 of Art. IV of the *U. S. Constitution*. Its denial is a deprival of liberty and property without due process of law. See definition of *due process of law* in *Truax v. Corrigan*, 257 U.S. 312, 331.

Nationality and Not Race Is the Characteristic of This Nation.

Race purity and race type are delusions of those who entertain the notion that blood strains are pure. The belief that coloration, mere skin pigmentation, divides mankind into pure races is unfounded. Chromosomes and their genes are not respecters of what is popularly called race or race-purity. They are assurers of a necessary admixture of bloods that has enabled and will continue to enable the human race to survive in changing environments by transmitting physical qualities and immunities essential to the survival of the human race. The difference in individuals has its basis in somatic cells and, in consequence, is restricted to trifling structural details of which skin pigmentation is the most noticeable feature. These structural matters are peculiar to individuals and are not determiners of races. The only race in mankind is the human race. What are popularly considered races is a confusion of obscure ideas, vague nomenclature, confused genealogy and hazy thought. Differences in skin-pigmentation do not make races. Individuals cannot even be properly classified by coloration which is neither a criterion nor an indication of race, quality of mind or temperament. Individuals and peoples can be properly identified only by *nationality*. It is this identification by nationality that is the distinguishing characteristic of individuals. The word *nationality* ought to be substituted in the popular concept for the word *race*. Suffice to say that the nationality of all of our citizens of Japanese and other familial ancestry is absolutely American. Each citizen is an in-

tegral part of the great American family to which he is inseparably bound by the American environment ingrained in his mind. The proclamation herein denies to citizens of Japanese ancestry rights it does not disturb in others. It would whittle away citizenship rights and consequently citizenship itself.

What distinguishes a nation is a common environment of country, tradition, law and national self-interest and objectives. The imprint of this environment is indelibly stamped in the mind of each citizen and in the minds of all those who permanently reside within a country's jurisdiction. It creates nationalism which is not a thing of ancestry but of environment. The country of one's domicile and residence and the nation inhabiting it which sustain and protect him gives rise to his allegiance, loyalty and patriotism. This nation was founded by those who were seeking liberty and equality. The Constitution they gave us embodies these basic concepts which are essential to a democratic state. The Constitution guarantees legal equality. It does not guarantee social equality which is dependent upon education, understanding and personal taste. Legal equality is a right—social equality is something that may be achieved. Legal equality is the birthright of every American citizen. Ancestry is not a determiner of constitutional right but it may be of social equality. It is not a determiner of loyalty. Singularly enough, many of those who, by the mere accident of birth, have a pinkish or whitish complexion conceive of themselves as typical representatives of a white race as though this conception of skin

coloration was of more importance to this nation than the conception of an American citizen. Race, a thing of vagary, looms larger in their minds than American nationality, a thing of reality, which determines allegiance, loyalty and patriotism.

The white-complexioned in America have no legal authority to suppress the rights of the yellow, the red and the black citizen. Ours is neither a government by majority nor plurality rule. The Constitution guarantees the rights of all and sets up barriers against such rule. If ours was a government of or by the majority we would all long-ago have been of a distinctive familial type of immediate ancestry having one color and one dominant state religion. Religious wars would have torn us asunder and the most powerful religious group would have suppressed other faiths or exterminated those adhering thereto. America would have been left in the possession of the dominant Protestant element which would have asserted an Anglo-Saxon origin, a combination of old foreign nationalities, and have tolerated no inhabitants of other faiths or origin.

There are a few individuals in this country who would take delight in having our Constitution distorted into a Visigothic Code in order to suppress the rights of Jews, Japanese and other minorities. There are many would-be Caligulas in America. They are of the peculiar type who would reserve this country for the whites. They would also reserve heaven for the whites and its opposite for all others. Divine Providence would appear to have made other provisions.

**STRANGE EVIDENCES OF ELECTION OF FOREIGN
ALLEGIANCE.**

The "evidences" on which the trial Court (R. 49, 50) determined that the appellant made an election of citizenship and "chose allegiance to the Emperor of Japan, rather than citizenship in the United States at his majority" are as follows:

- (1) His father "was decorated by the Emperor of Japan".
- (2) After admittance to the bar he was, at the instigation of his father, employed by the Consulate General of Japan at Chicago.
- (3) While so employed he followed his employer's orders and "made speeches setting forth the philosophy and purposes of the military caste of Japan as propaganda agent for the Emperor."
- (4) While so employed he was twice registered as a propaganda agent "pursuant to the regulations issued by the State Department of the United States."
- (5) He remained as such "propaganda agent until after the declaration of war by this country against Japan" and after the Japanese attack on Oahu.

The Decoration.

The appellant's father received some sort of recognition, testimonial or honor in 1940 at the Japanese Consul's office in Portland. (R. 181.) The recognition apparently was given for his activities "in promoting better relations between the Japanese and Americans

in Hood River." (R. 181, 182.) This was considered evidence adverse to the appellant by the District Judge whose written opinion (R. 50) recites the appellant's father "was decorated by the Emperor of Japan." This is an extraordinary finding of fact wholly unsupported by the evidence. It was inferred from a question put by the prosecution (R. 181) and answered by the appellant as above mentioned from hearsay. The action of the father in endeavoring to promote better relations between these Hood River people is a commendable matter. Whatever the nature of the honor, if any, bestowed upon him for his endeavors in a worthy cause, it was deserved. Our own government and also friendly societies interested in the assimilation of minority groups into community activities might have bestowed honor upon him therefor had his efforts been called to their attention. The trial judge penalized the appellant for an honor bestowed upon his father under the theory, as the opinion openly declares, that this matter was an evidence of appellant's election of allegiance to Japan. The conclusion of the trial Court is an example of illogic run wild.

The Employment.

The employment of the appellant by the Consulate General of Japan at Chicago was obtained through the instrumentality of recommendatory letters of the appellant's father, Dean Wayne L. Morse of the Oregon Law School, several other deans and officials of the university (R. 171) and sundry other persons in Hood River and Portland. (R. 155-156.) The recital

in the opinion below that this employment was obtained at the instigation of the appellant's father is only partially true. The mere fact of this lawful employment is not evidence of an election upon the part of the appellant to choose "allegiance to the Emperor of Japan" despite the trial Court's declaration (R. 49) that it is evidence of such a choice.

The Speeches.

The speeches made by the appellant under the terms of his employment by the Consulate General of Japan dealt with various subjects. (R. 158, 159.) They were made during *peacetime* and before the outbreak of war. A few were explanatory of the Japanese position in the undeclared war, the Sino-Japanese conflict, with special emphasis on the economic differences between China and Japan. (R. 188, 189.) During the period of time he made these speeches our own government was carrying on normal trade relations with Japan. We were selling munitions of war to Japan which were being used to destroy Chinese lives and property. It was our national foreign policy to maintain peaceful and friendly relations with Japan and the American public never dreamed Japan had any warlike designs on us. The appellant never dreamed Japan had any warlike designs on us. Had our government believed in such designs our trade relations would have ceased abruptly and we would not have had the disaster at Pearl Harbor. The appellant never condoned the military aggression of Japan against China in any of his speeches. (R. 189.) His motives in making these speeches were honorable

ones. (R. 184.) Many other citizens were making similar speeches in America. The opinion below sets forth that one of the evidences of appellant's election of "allegiance to the Emperor of Japan" was that he "made speeches setting forth the philosophy and purposes of the military caste of Japan as propaganda agent for the Emperor". (R. 49-50.) Speeches made during a period we were on friendly terms with Japan and while a war between Japan and China was in progress but in which this government took no part and which related to the economic bases of that war do not form a basis for the trial Court's statement.

The characterization of a general secretary in charge of correspondence who becomes a sort of public relations man by the label of "propaganda agent" is a distortion of fact by an adroit choice of wording. Obviously the speeches made by the appellant were explanatory in nature and contained statements of opinion on controversial issues. Copies of the speeches were not introduced into evidence and the testimony as to their contents was of a rather vague nature. Suffice to say, however, that the testimony as to their contents discloses the speeches were made in peace-time and did not contain an advocacy of anything forbidden. No penalty attaches to their utterance. The guarantee of *freedom of speech* under the 1st Amendment and the similar guarantee under the 14th contemplate absolute freedom of expression falling short of seditious utterances. See *Gitlow v. New York*, 268 U.S. 652, and formulation of "*clear and present danger*" rule in the dissent of Justice Holmes therein which became the rule established by the

Court in *Schenck v. U. S.*, 249 U.S. 47. See also *Bridges v. California*, 86 L. Ed. 149, 153; *Thornhill v. Alabama*, 310 U.S. 88; *Hague v. C. I. O.*, 307 U.S. 496; *Lovell v. Griffin*, 303 U.S. 444; *Palko v. Connecticut*, 302 U.S. 319; *De Jonge v. Oregon*, 299 U.S. 353, 366, and *Stromberg v. California*, 283 U.S. 359, 368. From the meager evidence in the record as to the nature of the speeches it clearly appears they contained neither reprehensible nor unlawful utterances. It would tax the imagination to conceive how lawful speeches could be considered evidence of an election to renounce citizenship in the United States and acquire citizenship in Japan.

The Registration.

The registration of the appellant by the Consulate General with the Department of State as an employee of a foreign representative is a legal requirement. (See R. 58.) It is not evidence of an election upon the part of the appellant to choose "allegiance to the Emperor of Japan" notwithstanding the trial Court's statement in his opinion (R. 49, 50) to the contrary.

The Resignation.

We were attacked by the enemy forces of Japan at Oahu on Sunday, December 7, 1941. The news of the attack came over the radio in the late morning of the 7th and the announcement appeared in newspaper extras that evening and in the regular editions the following morning. The appellant heard the news on the day or evening of Sunday, the 7th (R. 159) but at what time the record does not disclose. He

resigned his position on Monday, December 8th, the morning following the attack. (R. 160.) His resignation was very prompt under the circumstances for he could not have resigned on the Sabbath when he was not at work and the consulate offices were closed. The radio announcements made during the 7th exhibited confusion as to whether the hostile act was war or whether it was an unauthorized attack by uncontrolled Japanese forces acting without sanction of the Japanese government. The announcement that Japan had declared war against Great Britain and the United States was first received here from Toyko radio reports published in the Monday morning newspapers. On December 8th Congress formally declared war against Japan. The appellant had already resigned his position. The trial Court's statement in the opinion (R. 50) that the appellant remained a "propaganda agent until after the declaration of war by this country against Japan" is erroneous and wholly unsupported by the testimony and facts. Its finding that the appellant remained in the employ of the Consulate General "after the treacherous attack by the armed forces of Japan upon territory of the United States in the Islands of the Pacific" (R. 50) is true only in so far as he remained therein until he had time to resign a few hours later when the Consulate office opened on Monday. His action in resigning on December 8th was not only prompt but was probably tendered without verification of the fact that the hostile attack was actually the commencement of war.

**THE ASTONISHING CONCLUSIONS DRAWN BY
THE TRIAL COURT.**

In the opinion (R. 50) the trial Court concluded that the appellant "served the purpose and philosophy of the ruling caste of Japan as a propaganda agent because he could speak English, and only resigned when it seemed apparent that he could no longer serve the purposes of his sovereign in that office, but could do better execution in the event he could be commissioned an officer in the armed forces of the United States on active service." It also concluded that "since Yasui is an alien who committed a violation of this act, which included by reference the regulations of the commander referring to aliens, the Court finds him guilty."

These are astonishing conclusions. The appellant is an American citizen by birth. He is domiciled here and resides here. He was reared and educated here. He and his parents are Methodists. He was commissioned as a reserve officer and took his oath of allegiance as such *after* he had attained his majority. He is a registered voter. He is an attorney-at-law and doubtlessly took his oath of allegiance to this country upon being admitted to the bar when he was almost 23 years of age. He is a member of the Japanese-American Citizens League. (R. 178.) It is doubtful if there are persons in the United States whose devotion and loyalty to this country exceeds that of the members of this League. They have no peers in patriotism. The appellant tendered his services to this country as a reserve officer on December 8, 1941, the day following the Pearl Harbor attack and the

day on which Congress declared war on Japan. Thereafter he eagerly sought to be assigned to active duty against our enemies. What more could he offer to his country to demonstrate his loyalty, devotion and allegiance? The testimony of impartial witnesses proves that he viewed and had declared the Japanese government to be a criminal one. (R. 112, 117.) That he is devoted to the United States was amply proved by his declarations that he would intern and, if necessary, destroy all the Japanese in this country had he been in command of our defense and believed such action necessary to our safety. (R. 113, 125, 126, 128, 160 and 186.)

It is apparent from the record that the trial Court reached its incredible conclusions from the appellant's responses to an interrogation by the Court. (R. 193-201.) It appears that one of the reasons the Court found him guilty is that the appellant accepted his employment after he had heard stories of the pre-war utterances of Matsuoka, an old graduate of the University of Oregon, who became, for a while, a foreign minister of Japan. (R. 193-194.) Matsuoka was an admirer of Mussolini and an articulate person whose rise to political heights in Japan was meteoric and whose drop to political depths of unpopularity was just as rapid because of his exaggerated self-importance and bellicose statements. He was the man who attained widespread publicity by walking out on the League of Nations and was once widely quoted as stating "Mussolini stalks with God", the substitution of the word stalks for the word "walks" having been unintentional. Why should the utterances

and attitude of one Japanese official, known to the appellant only by hearsay reputation, have prevented him from accepting employment in the Japanese Consulate General's office?

The underlying reason, however, for the Court's amazing finding of guilt is that the appellant in his civilian capacity as a citizen would test the constitutionality of this proclamation whereas if called into active military service he would obey the mandates thereof as orders of his commanding officer. (R. 197-201.) The trial Court evidently entertained a notion that a reserve officer who is not in active service and whose status is that of a civilian engaged in private pursuits occupies the status of a military man who is within the jurisdiction of the military authorities and must obey military orders whether constitutional or not. Such a concept is entertained only by those whose background or profession is a military one or who yearn to substitute a military career for that which they follow. Military government cannot be substituted for civil government for civilians holding reserve commissions who are not in active military service. If it could all that would be necessary to supplant civil law would be for the government to declare every person in the country a reserve soldier subject to military law and discipline.

CONCEPTS OF INTERNATIONAL LAW.

In deciding that the appellant was not a citizen but an alien enemy, the trial Court made the following remarkable statement in its opinion (R. 46):

"By international law, however, he was also a citizen of Japan and subject of the Emperor of Japan. According to international law, also, he had upon attaining his majority, but not before, the right of election as to whether he would accept citizenship in the United States or give his allegiance to the Emperor to whom he was bound by race, the nativity of his parents and the subtle nuances of traditional mores engrained in his race by centuries of social discipline."

The international law to which the Court refers is non-existent. The authority cited by the Court in support of this extraordinary conclusion is *Perkins v. Elg*, 307 U.S. 325, a case involving the laws of Sweden and the United States but not the laws of Japan. The case held that where a native born child had been taken to Sweden where she was, under Swedish law, deemed a citizen of Sweden she was entitled to return here upon attaining her majority and elect to retain American citizenship.

A grant of citizenship by a foreign power to persons outside its own territorial jurisdiction and within the jurisdiction of another power does not establish dual citizenship. It is a mere offer to individuals requiring their acceptance and the consent of the government having actual jurisdiction over them. In international law dual citizenship exists when a person holding citizenship in one country is physically present in the territorial jurisdiction of a foreign power which, by reason of his presence there, recognizes him as a person entitled to citizenship rights. In such an event the person does not lose his original

citizenship except by renunciation or expatriation according to the laws of the country in which he holds original citizenship. The only exception to these rules is where two countries by law confer citizenship directly upon persons by consent of the respective sovereigns but in such instances the jurisdiction of each is operative only when the person is physically within its territory. A case of this nature is said to be that of the lineal descendants of General Lafayette who hold French citizenship by reason of French law and also American citizenship by virtue of an act of Continental Congress, but the citizenship rights they hold in the United States can be exercised only when they are physically present within our territorial limits.

The claims of the present German government that all descendants of Germans wheresoever situated are German subjects is not a rule of international law but a wild fancy of the sabre-rattling individuals who hold the German nation in a vise of terror. These absurd claims do not establish dual citizenship or allegiance. In whatever light a foreign power views American citizens in America who are descended from ancestors who once inhabited the presently held terrain of the foreign power no sober-minded American citizen would entertain a notion that it vested foreign citizenship in him or gave the foreign power jurisdiction over him.

The Appellant Was Not Expatriated.

The international law to which the trial Court adverted in its opinion to support its conclusion but which is in nowise supported by its citations has

neither reality nor significance. Since 1924 the Japanese nationality law has provided that the only method by which an American-born Japanese can obtain rights to Japanese citizenship is by being registered at birth with a Japanese consular official. See *H. R.* 2124, p. 85, note 80. The appellant was never so registered. Such a registration, however, could not constitute dual citizenship. The act of registration by one's parents could not deprive a minor of citizenship in the United States and could not render him subject to the jurisdiction of the Japanese government. Our expatriation statute expressly disavows the claims of all foreign governments to the allegiance of our citizens. 18 U.S.C.A., Sec. 800.

The appellant is a citizen of the United States and of the State of Oregon by birth by virtue of the 14th Amendment. *U. S. v. Wong Kim Ark*, 169 U.S. 649; *Morrison v. California*, 291 U.S. 82. He is also declared to be a citizen and national of the United States by an Act of Congress. See the Nationality Act of 1940, 8 U.S.C.A., Sec. 501, which was formerly Sec. 1 and Sec. 601. The indictment admits and alleges the fact of his citizenship. (R. 3.)

In the *Expatriation Statute* which is now incorporated in the Nationality Act of 1940 as Title 8 U.S.C.A., Sec. 800, but was formerly Sec. 15 thereof, the United States expressly *disavows* the claims of foreign governments to the allegiance of American citizens and their descendants. It also vests in citizens the right to expatriation. A citizen by birth, however, cannot lose American nationality and citi-

zenship except by one of the specific methods prescribed in the Nationality Act. See 8 U.S.C.A., Secs. 801, 803 and 808. The appellant herein did not lose his nationality or citizenship by any of the methods therein described.

The expatriation statute does not enable a person to become a citizen of another country without being naturalized under the authority of the foreign state. *Elk v. Wilkins*, 112 U.S. 94, 28 L. Ed. 643, 5 S. Ct. 41. In view of this statute the consent of the government is not necessary for a citizen to expatriate himself if he follows its procedure but the consent of the foreign sovereign is necessary for him to acquire its nationality. *Jennes v. Landes* (CC-Wash.), 84 Fed. 73. The right of voluntary expatriation is inherent if the method pursued is one of those prescribed by the expatriation statute. *U. S. ex rel. Scimeca v. Husband* (CCA-2), 6 Fed. (2d) 957. Until October 14, 1940, when it was repealed, Title 8 U.S.C.A., Sec. 16, provided that, "No American citizen shall be allowed to expatriate himself when the country is at war." It is not improbable that this rule obtains as a rule of common law despite the repeal of the statute inasmuch as the country has the inherent and sovereign right to the services of its citizens during war periods.

If the citizenship of the native-born can be lost on such evidence as was introduced at the trial below, what is to follow as the logical result of the precedent established? Simple suspicion could cost millions their citizenship. Our Jewish citizens could be considered Orientals owing a spiritual allegiance to Juda-

ism and be decitizenized. The Catholic minority of our citizenry could be decitizenized because it admits a spiritual allegiance to Rome and the Church of Rome has ever desired to dominate all States. The citizens professing a spiritual tie to the lesser Protestant denominations could be decitizenized. Each person lawfully entering the employ of a foreign power's representatives in this country could be decitizenized and the consent of our administration to their employment could not be pleaded in bar. The country would be filled with inhabitants who had been converted into aliens. If they could not be deported to a foreign country their presence here would be by sufferance. They would be deprived of civil rights and occupy the status of criminals. That the native-born should hold citizenship so insecurely and be subject to losing it on such evidence as was adduced at the trial below is utterly incredible and presents a problem of the gravest danger to American democracy. The opinion below must be repudiated and the judgment reversed.

THE NUANCES OF TRADITIONAL MORES.

What are these things called "race", the "nativity of his parents" and the "subtle nuances of traditional mores engrained in his race by centuries of social discipline" which the trial Court's opinion (R. 46) declares bound the appellant to the Emperor of Japan. They are matters of the imagination. It appears, however, that they have been construed to penalize the appellant and to deprive him of citizenship.

The geographical situs of the nativity of the parents of the appellant could have no bearing on any issue involved herein and must be disregarded. His parents, although born in Japan, have resided the greater portion of their lives in the United States where their children were born, reared, educated and employed. America sustains them and they in turn contribute their industry and services to its welfare. This family and its ties are typically American as the record demonstrates.

Heredity Versus Environment.

The appellant's "*race*" and the "*subtle nuances of traditional mores engrained in his race by centuries of social discipline*" are fictional. The word *subtle* means crafty and the word *nuances* means shades of color but as used by the Court it signifies shades of mind. The word *mores* means customs, conventions or manners. The Court's charge is, therefore, that the appellant is bound to the Emperor of Japan by "*race*" and the "*crafty mental shades of traditional customs engrained in his race by centuries of social discipline*". The charge is absurd. The District Court failed to appreciate the distinction between matters of heredity and matters of environment.

Anatomical structure and physiological function are things of heredity. Mental stability and qualities are derived from environment. Pathological conditions and psychoses may impair mental stability and qualities but these disorders are environmental and not things of an inherited nature. The brain structure is congenital and derived from heredity but the

mind with its faculties is the product of environment. The mind contains nothing of race and is not atavistic. The instincts are propensities prior to experience and independent of instruction and training. They are reflexive actions of a preservative nature characteristic of all animal life from the protoplasm upward in the evolutionary cycle. They are not things peculiar to any zoological phyla, order, class, genus or species. Were a human after birth deprived of nearly all environmental experience its brain would develop structurally but its actions would never intrude beyond the instinctive stage. The human mind is a blank at birth but it is plastic and impressible. What is subsequently impressed thereon and thereafter resolved into expression as thought is but a reflection of environment and not of heredity. There is no such thing as race instinct resulting in engrained mental nuances of traditional mores. The social traditions of one's ancestors were environmental factors acquired by them and peculiar to them but they are not experiences of an inheritable nature transmittable to descendants.

The environment of the appellant was characteristically American. The whole of the record gives a vivid picture of a young man loyal and devoted to this country and eager to be of whatever service this Nation might require. If the "subtle nuances of traditional mores" which the Court below assigned to him as hereditary factors had a factual basis not only the appellant but all mankind today would think and act in the precise patterns of ancestors, as primitive man, and not at all as civilized or modern man.

If these strange mores were farther traced their origin would have to be found in the first protoplasmatic bodies inhabiting the waters of the earth. These would be found exhibiting all the symptoms of instinctive reaction to stimuli but none of the mind. Protozoa have instincts but lack mores. If all animal life has evolved from protozoa we derive our instincts from these remote ancestors. Our mores arise from our own environment. The struggle of man has been upward by his individual reaction to his environment. He doesn't come into the world with the customs, conventions, manners, mores or social discipline of his ancestors engrained in his mind or attached to him as mental or physical appendages. The descendants of medieval knights are not born with the chivalric code of honor engrained in their minds and their bodies encased in suits of armor.

Race Versus Nationality.

The trial Court conceived of race as something of which it peculiarly had judicial knowledge or took judicial notice in the absence of any evidence adduced thereon. Its concept was contrary to all known anthropological facts. Its conception of race was that it was a vague hereditary something imprinting all individuals at birth with the markings of special ancestral types. It believed these types derive structural and mental peculiarities traceable to remote ancestors or primitive but distinct prototypes in an unbroken and unpolluted blood line to which all descendants necessarily conform physically and mentally. It also believed the descendants owe allegiance by virtue of

race to the sovereigns of one's ancestors without considering that in the migrations and peregrinations of one's ancestors various sovereigns of diverse states may have claimed suzerainty over sundry ancestors. Allegiance is not a matter of heredity but a matter of jurisdiction dependent upon environment. It is odd too that by a process of mental gymnastics the trial Court assumed, without any supporting evidence, that the appellant's grandparents and ancestors for centuries were Japanese subjects for it asserts that mores were engrained in the appellant's race by centuries of social discipline. Whether or not the appellant's ancestors were for centuries subjects of Japanese Emperors the "social discipline" of his ancestors could not be other than those acquired environmental habits peculiar to those so disciplined. Inasmuch as their social conduct sprang from somatic brain cells and not from generative germ-cells which are the bearers of heredity their social habits were not transmittable hereditary responses. The habits acquired by each individual are peculiar to him and are not derived either from lineal or collateral ancestors but from environment. Neither the place of nativity of one's parents or ancestors nor the ethereal nuances of traditional mores which the Court below mentions could possibly have any effect whatsoever upon a person's allegiance which is a thing of nationality springing from sources quite different.

The trial Court seems to have considered race a determiner of allegiance to a country and nation. The conceit of race is a species of vanity. It has been said that if you scratch a Russian you expose a Tar-

tar. It might also be said that if you scratch any white man you expose his Tartar ancestry for there is Mongol blood in addition to many other darker types of ancestral blood flowing in the veins of every white man. From antiquity to modern times great hordes of men have spread over the face of the earth and great mass movements are taking place today. The result has always been and perhaps always will be the intermingling and interbreeding of peoples of all colors regardless of their geographical origin and that of their ancestors. No individual alive can truthfully assert that the color of his skin is a guarantee of freedom from the blood of ancestors whose skins were of coloration other than his own. Any reputable anthropologist and ethnologist would readily admit that every individual alive has traces of blood derived from ancestors of every conceivable type of skin pigmentation and that these ancestors came from every region of the earth. Could we view the recessive colorations which are overshadowed by the dominant ones in each individual those who pride themselves on being pure whites would indeed suffer a shock. The transmission of skin coloration to progeny as an incident of physical structure does not create races. What are popularly supposed to be races is a delusion. Nationality has reality. Peoples throughout the world are properly classifiable by *nationality* and by no other means. Citizenship is a product of nationality and, under a democratic constitutional government, is not a thing of degrees. Each person in America who is not an alien is an American. There are no Japanese, Germans and Italians in the United States

except they be aliens. The appellant is not a Japanese. He is an American. His nationality is American. He is a citizen of the United States. The nationality of some of his ancestors does not attach to him as an appendage to deprive him of citizenship. The record demonstrates him to be loyal, patriotic and devoted to this country. It reveals an eagerness upon his part to serve in our military forces.

The District Court Erred in Its Findings.

The opinion of the District Court is correct only in so far as it declares that the statute and proclamation involved herein were inapplicable to American citizens. The finding of that Court that the appellant renounced or lost his American citizenship is not supported by an iota of evidence. The finding by that Court that the appellant owed allegiance to Japan is not supported by a scintilla of evidence. Contrary to the whole of the evidence introduced at the trial below that Court declared the appellant to be an alien enemy. The judgment and opinion are in nowise supported by the record. The judgment should be reversed for these reasons and for the reason that the statute and proclamations are unconstitutional and void on their faces and as applied to the appellant herein.

CONCLUSION.

The division of the entire country into military departments, districts and areas for mere military convenience does not render the citizens residing

therein amenable to military orders. If it did military fiats would possess more efficacy than the Constitution. If the statute and the proclamation which was followed by the dictatorial military exclusion orders herein are upheld it will become quite clear that a military dictatorship over this nation is an established fact. It will become quite clear that the Bill of Rights has been plucked from the Constitution. It will become quite apparent that the Constitution itself has become a lifeless instrument of interest only to historians. It will become quite evident that we have abolished at home the very civil rights and human liberties for which we are now fighting to preserve in this world on far-flung battlefields. Liberties are not gifts—they are rights. Restore them to us and

“The rays of Freedom’s light shall spread
For her spirit is not dead
But lives to set men free.”

Dated, San Francisco, California,
May 5, 1943.

Respectfully submitted,

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OCTOBER TERM, 1942

No. 871

MINORU YASUI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

MEMORANDUM BRIEF OF STATES OF CALIFORNIA, OREGON AND WASHINGTON AS AMICI CURIAE.

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In the Supreme Court
OF THE
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OCTOBER TERM, 1942

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MINORU YASUI,

Appellant,

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Appellee.

MEMORANDUM BRIEF OF STATES OF CALIFORNIA, OREGON
AND WASHINGTON AS AMICI CURIAE.

In a companion case now pending before this Court, *Hirabayashi v. United States*, No. 870, the States of California, Oregon and Washington joined in a brief as amici curiae for the purpose of presenting their views on some of the important questions of law involved therein.

That case also involves the question of the liability of a person of Japanese ancestry charged under a Federal criminal statute (Public Law 503, 56 Stat. 173) with having disobeyed the curfew regulations

imposed upon all persons of Japanese ancestry living within certain Pacific Coast military zones. (Public Proclamation No. 3 (7 Fed. Reg. 2543) by Lieutenant General J. L. DeWitt, Commanding General of the Western Defense Command and Fourth Army, March 24, 1942.

The decision to be rendered in this case and the *Hirabayashi* case will have an important bearing upon the more general question of the right of the military authorities in time of war to impose controls on civilians resident within the United States. In order to relieve the Court of the burden of reading a second brief on this subject, *amici curiae* respectively refer the Court to the brief filed in the *Hirabayashi* case and request that that brief, as it applies to the above mentioned specific and general issues, be considered as filed in the instant case.

THE OPINION OF THE COURT.

The Court below, while recognizing the emergency which called for action (Tr. 18, 19), held that the curfew regulations could not be enforced in a civil court against persons of Japanese ancestry who were American citizens because:

1. The issuance of regulations and making the violation of them a crime was a legislative function;
2. A military commander has no such legislative power (Tr. 31);
3. The Courts cannot enforce the regulations of a military commander (Tr. 43);

4. Nor could Congress make criminal the violations of the regulations (Tr. 44);

5. While such regulations could be issued under martial law, martial law cannot be validly established unless,

(a) It has been formally established by proclamation (Tr. 40);

(b) In a theater of active military operations the Courts have been closed and civil government is no longer able to function (Tr. 39—adopting the test of necessity of the majority dictum in *Ex parte Milligan*, 4 Wall. 2, 127 (1866));

The brief filed in the companion case deals fully with these contentions. However, the trial Court rendered judgment against the defendant Yasui because, after gaining his majority, he elected to be a subject of the Empire of Japan and thus, as an enemy alien, the curfew regulations could be properly enforced against him in criminal proceedings in a Federal Court (Tr. 46-51). Congress, the Court said, could make criminal the violation of regulations to be issued by the Commanding General with respect to enemy aliens (Tr. 46).

Amici curiae do not express any opinion on the judgment and finding that the defendant surrendered his right to American citizenship by electing to become a subject of Japan. Arising as it does, it is essentially a matter of federal concern. But it is submitted that such a finding should invoke the most

serious consideration of this Court. A number of the native-born Japanese residents of the Pacific Coast States may have affiliated themselves in one way or another with agencies of the Japanese Government as did the defendant herein. It is believed to be of the utmost importance that some guides be furnished as to the quantum of evidence required before a Court will be justified in finding that an election to surrender such a precious thing as American citizenship has been made. The claim of the Japanese Government that all persons of Japanese ancestry are or may elect to become citizens regardless of the place of birth might be properly examined at this time. Furthermore, the operation of the Japanese Nationality Law is a complex legal puzzle to many of the American Japanese resident within the Pacific Coast States.* The instant case presents an opportunity to examine this subject of dual citizenship and to state the principles upon which it operates with reference to the American law of citizenship. *Amici curiae* believe that the considerations concerning national citizenship should be kept free of the considerations which made the imposition of curfew a military problem.

Regardless of any question of the defendant's status as an enemy alien, the States of California, Oregon and Washington submit that the curfew regulation could be imposed on the defendant, whether alien or citizen, as a proper exercise of the war power. Such

*House Select Committee Investigating National Defense Migration (Tolan Committee), Hearings, Part 29, Statement of Henry Tani, Executive Secretary of American Japanese Citizens League, p. 11150.

controls as curfew, when imposed upon civilians within military areas for the purpose of carrying out the federal function of protecting the States against invasion (Const., Art. IV, sec. 4) and defending a military area against attack, sabotage or espionage, are proper measures of limited martial law.

Dated, San Francisco, California,
May 7, 1943.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 871.—OCTOBER TERM, 1942.

Minoru Yasui, Appellant,
vs.
United States of America. } On Certificate from the United
States Circuit Court of Appeals for the Ninth Circuit.

[June 21, 1943.]

Mr. Chief Justice STONE delivered the opinion of the Court.

This is a companion case to No. 870, *Hirabayashi v. United States*, decided this day.

The case comes here on certificate of the Court of Appeals for the Ninth Circuit, certifying to us questions of law upon which it desires instructions for the decision of the case. § 239 of the Judicial Code as amended, 28 U. S. C. § 346. Acting under that section we ordered the entire record to be certified to this Court so that we might proceed to a decision, as if the case had been brought here by appeal. 318 U. S. —.

Appellant, an American-born person of Japanese ancestry, was convicted in the district court of an offense defined by the Act of March 21, 1942, 56 Stat. 173. The indictment charged him with violation, on March 28, 1942, of a curfew order made applicable to Portland, Oregon, by Public Proclamation No. 3, issued by Lt. General J. L. DeWitt on March 24, 1942, 7 Federal Register 2543. The validity of the curfew was considered in the *Hirabayashi* case, and this case presents the same issues as the conviction on Count 2 of the indictment in that case. From the evidence it appeared that appellant was born in Oregon in 1916 of alien parents; that when he was eight years old he spent a summer in Japan; that he attended the public schools in Oregon, and also, for about three years, a Japanese language school; that he later attended the University of Oregon, from which he received A.B. and J.L.B degrees; that he was a member of the bar of Oregon, and a second lieutenant in the Army of the United States, Infantry Reserve; that he had been employed by the Japanese Consulate in Chicago, but had resigned on December 8, 1941, and immediately offered his services to the military authorities; that he had discussed with an agent of the Federal Bureau

Investigation the advisability of testing the constitutionality of the curfew; and that when he violated the curfew order he requested that he be arrested so that he could test its constitutionality.

The district court ruled that the Act of March 21, 1942, was unconstitutional as applied to American citizens, but held that appellant, by reason of his course of conduct, must be deemed to have renounced his American citizenship. 48 F. Supp. 40. The Government does not undertake to support the conviction on that ground, since no such issue was tendered by the Government, although appellant testified at the trial that he had not renounced his citizenship. Since we hold, as in the *Hirabayashi* case, that the curfew order was valid as applied to citizens, it follows that appellant's citizenship was not relevant to the issue tendered by the Government and the conviction must be sustained for the reasons stated in the *Hirabayashi* case.

But as the sentence of one year's imprisonment—the maximum permitted by the statute—was imposed after the finding that appellant was not a citizen, and as the Government states that it has not and does not now controvert his citizenship, the case is an appropriate one for resentencing in the light of these circumstances. See *Huston v. United States*, 282 U. S. 694, 703. The conviction will be sustained but the judgment will be vacated and the cause remanded to the district court for resentencing of appellant, and to afford that court opportunity to strike its findings as to appellant's loss of United States citizenship.

So ordered.